INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

DANIEL W. KAPPES

AND

KAPPES, CASSIDAY & ASSOCIATES

Claimants

v.

THE REPUBLIC OF GUATEMALA
Respondent

ICSID Case No. ARB/18/43

CLAIMANTS' REPLY

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11 June 2021

WHITE & CASE

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I. INTRODUCTION

1. Pursuant to Procedural Order No. 1 dated 10 September 2019, as amended, Mr. Daniel W. Kappes and Kappes, Cassiday & Associates ("KCA," and jointly with Mr. Kappes, "Claimants") hereby submit this Reply in response to Guatemala's Counter-Memorial dated 7 December 2020 ("Counter-Memorial").

2. Nearly 100 years ago, the Commissioner deciding the *Shufeldt* claim held Guatemala liable for violations of international law, after Guatemala denied a U.S. investor rights that the government had granted and recognized for years.[1] Unfortunately for Claimants, history has repeated itself and Guatemala, once again, has violated its international law obligations by refusing to respect the license that it validly-issued, which has destroyed Claimants' investment in *Exploraciones Mineras de Guatemala* ("Exmingua"). Guatemala's arguments seeking to avoid international responsibility for its grave breaches by invoking its own alleged non-compliance with its domestic law have not grown better with age, and should suffer the same fate as those dismissed in *Shufeldt*.

3. With their Memorial, Claimants showed that they invested in a highly-promising exploration property, which they successfully developed into an operational gold mine. Years later, bowing to political pressure, the State indefinitely suspended Exmingua's exploitation license and seized its gold concentrate. Despite the fact that Exmingua had the support of the community – as evidenced by the community consultations it conducted with a government-certified consultant and the lack of any objection raised during its licensing process – the Government caved to outside groups opposing the mine and suspended Exmingua's validly-granted license on the ground that the State was obligated under ILO Convention 169 to conduct consultations and the license could only regain effectiveness once it did so. Claimants also explained how this was contrary to the State's long-held and well-publicized position that the community consultations required as part of its mining licensing procedure satisfied the State's ILO Convention 169 obligations. Notwithstanding that more than five years have since passed, the Government still has not conducted consultations and Exmingua's license remains indefinitely suspended.

4. Lacking any valid defense, Respondent resorts to mud-slinging and defamation – asserting that Claimants are "the worst" and "deserve this reputation" – when Claimants are a well-respected, credentialed professional and company, respectively, that did not passively invest, but planned, managed and operated their investment at every stage; engaged licensed consultants; received all

[1] *Shufeldt Claim (Guatemala / US)*, Award dated 24 July 1930, II R.I.A.A. 1079, 1094 (emphasis added) (CL-0386).

necessary government approvals; and provided much-needed employment, health, education, and infrastructure benefits to an area neglected by the Guatemalan Government. The invective and hyperbole in Guatemala's Counter-Memorial cannot disguise the fact that it has no defense for its actions. No doubt aware of this, Guatemala has taken a scorched-earth approach, leaving no fact unchallenged, no matter how small or well-established, and raising patently meritless legal objections.

5. In this vein, ignoring well-established and consistent jurisprudence that an illegality objection is only a defense to jurisdiction or admissibility when a claimant has acted in grave violation of law when making its investment, Guatemala wrongly accuses Exmingua (not Claimants) of a variety of infractions, all of which are wholly without merit and occurred well after Claimants made their investment. Guatemala, for instance, relies on a blatantly unjust court decision in a case brought by an anti-mining NGO holding, in a single conclusory sentence, that Exmingua lacked a construction permit – despite the fact that the permit had been granted, the fee for the same paid and acknowledged, and construction had been ongoing, in plain sight and was nearly completed without any complaint when the suit was filed. Guatemala also asserts that Exmingua operated its plant unlawfully by processing at a rate higher than that set forth in its Environmental Impact Assessment ("EIA"), notwithstanding that the EIA does not contain any limitation in this regard and that its own regulatory agencies conducted inspections in which they both noted, without any criticism, the plant's throughput. Particularly misleading is Guatemala's further argument that Exmingua violated its environmental commitments, relying on the initial inspection reports prepared after Exmingua commenced operations, without even mentioning the follow-up inspections and the fact that Exmingua never was even fined for any environmental infractions.

6. With no answer to the claims before it, Guatemala raises a host of irrelevant, *post-hoc* complaints. It attacks Exmingua's EIA on the basis of reports that were commissioned by anti-mining NGOs specifically with the objective of criticizing the EIAs of foreign-owned mining companies whose licenses already had been granted. Relying on these, Guatemala argues at length that Exmingua's EIA lacked required environmental data, completely ignoring that the EIA was prepared by a government-certified consultant and reviewed by its own government specialists who approved it more than a decade ago. Guatemala likewise devotes much effort to condemning the EIA's social studies and related consultations, despite the fact that it, too, was prepared by a government-certified consultant and approved by its own government specialists. In the end, Guatemala's efforts are all for naught, as these alleged deficiencies are not only spurious, but they indisputably did not form the basis for *any* of the measures challenged in this Arbitration.

7. As for these measures themselves, which include the courts' rulings and the MEM's actions indefinitely suspending Exmingua's Progreso VII license for *the State's* failure to conduct

consultations; the unlawful suspension by the MEM of Exmingua's export license; the indefinite *de facto* suspension of Exmingua's Santa Margarita exploration license; the unlawful seizure of Exmingua's gold concentrate; and the State's actions and omissions precluding Exmingua from obtaining an exploitation license for Santa Margarita, Guatemala has surprisingly little to say.

8. At bottom, Guatemala does not – because it cannot – defend against its unlawful, retroactive application of a new requirement to a validly-issued license, in which Exmingua had a vested right. Instead, Respondent perversely accuses Claimants of conducting inadequate due diligence before making their investment, without ever identifying what it is that Claimants purportedly could have "discovered." In light of this, it is perhaps unsurprising – although remarkable – that Guatemala's legal expert *completely ignores* the fact that the State repeatedly and publicly declared before the IACHR that consultations led by project proponents pursuant to its Mining Law and regulations, as required for the approval of an EIA, satisfied the consultation requirement under ILO Convention 169, while Guatemala does not renounce its declaration, but half-heartedly ponders just how "public" it was. In the face of such blatant injustice, Guatemala does not even attempt to defend the substance of its courts' decisions – instead merely decrying, wrongly, that those rulings cannot be examined by an international tribunal. As far as the procedural due process violations are concerned, Guatemala's legal expert concedes that the courts "innovated" in Exmingua's case by, among other things, granting the NGO CALAS standing to file an *amparo* proceeding in the first place.

9. Guatemala's attempt to justify its actions by reference to the importance of ILO Convention 169 and the State's public interest in community consultations, moreover, is irreconcilable with its *continuing failure* to conduct those very consultations. Indeed, the various State branches have instead worked together to delay indefinitely the commencement of any consultations for Exmingua's license. Despite court rulings dating back more than five years directing the MEM to conduct consultations, the MEM has refused to do so, insisting that it cannot because the Constitutional Court's ruling of exactly one year ago is not yet final. This is predicated on the MARN's filing of a baseless request for clarification of that ruling, and the Court's refusal to rule on that request for more than nine months, despite the requirement for it to do so within 48 hours.

10. Equally revealing of its bad faith is Guatemala's contention that Claimants were not harmed by its admittedly unlawful and *ultra vires* suspension of Exmingua's export certificate, because that suspension was later revoked – without revealing that the MEM revoked its suspension after five months, and *one day* after the certificate had expired pursuant to its terms.

11. Given the MEM's refusal to conduct consultations for the Progreso VII exploitation license as well as the court ruling holding that both exploitation *and* exploration licenses may not be issued or

may be suspended barring MEM-led consultations, Exmingua's Santa Margarita exploration license also remains effectively suspended. Indeed, even assuming that Exmingua legally could engage in exploration for a short time before having its license suspended, it would be imprudent for it to do so, as no investor would engage in exploration without any expectation of being able to obtain an exploitation license.

12. The State, moreover, has refused Exmingua's pleas for assistance in dispersing the protesters and dismantling the blockade so as to allow Exmingua and its consultant to conduct the social studies necessary for completing its Santa Margarita EIA. To make matters even worse, the MEM refused Exmingua's requests for assistance and guidance in conducting those consultations, and further inflamed the situation by imposing and refusing to repeal a fabricated 30-day deadline for Exmingua to submit its completed Santa Margarita EIA, which had no basis in law, when it was informed that it was impossible for Exmingua to complete the consultations in light of the blockade. All of these actions and omissions are consistent with Guatemala's *de facto* moratorium on issuing new mining licenses. Guatemala's retort that Claimants have failed to identify any State action in respect of its Santa Margarita license flies in the face of this evidence.

13. Guatemala's harassment and bad faith has only intensified and become more evident in the year that has passed since Claimants filed their Memorial Submission. Just a few weeks ago, a court finally ordered the release of Exmingua's seized concentrate – acknowledging, over the Attorney General's objection – that it had been unlawfully held. Immediately thereafter, Exmingua's bank accounts were frozen and their funds seized, ostensibly for the payment of a five-year-old fine levied by the MEM on account of Exmingua operating until May 2016, when the MEM's suspension order was issued two months earlier. Exmingua uses those accounts to pay for the environmental maintenance that it is required to continue carrying out, even though it earns no revenue. Guatemala is thus aggravating the dispute before this Tribunal by sanctioning Claimants for non-compliance with the very measures that are at issue in this Arbitration, and also seeking to compel Claimants to make further investments into Guatemala (by seizing any funds Claimants deposit into Exmingua's bank accounts), after Guatemala has rendered Exmingua worthless and completely deprived Claimants of the value of their investment. As described herein, Guatemala should be ordered to pay full reparation to Claimants.

14. Together with the substantial documentary evidence referenced herein, Claimants' Reply is supported by the following witness statements and expert reports:

- *Jorge Rodolfo Carraza Muralles*: elected representative of the Community Council for Urban and Rural Development ("COCODE") within San Pedro Ayampuc;[2]

- *Hery Arodi Gálvez Rivera*: former employee of Exmingua;[3]

- *Telma García Recinos de Mocario*: elected representative of the COCODE within San Pedro Ayampuc;[4]

- *Daniel W. Kappes*: Claimant and one of the founders and the sole owner, as well as the President and Chief Executive Officer of, KCA;[5]

- *Dr. Mike Armitage, BSc, MIMMM, FGS, CEng, CGeol and Dr. James Siddorn, BSc, MSc, FGS, PGeo*: Mining Experts; Consultants (Resource and Structural Geology) at SRK Consulting (UK) Ltd.;[6]

- *Prof. Mario Roberto Fuentes Destarac*: Expert on Guatemalan law; Professor of Civil Procedural Law and Constitutional Law at the Faculty of Legal and Social Sciences of the Rafael Landívar University and Partner at Destarac Law;[7]

- *Margarita Mendoza Yaquián de Cordón*: Expert on social management, stakeholder relationships and risk and crisis management; Chief Executive Officer and Founding Partner of Diestra and Executive Vice President of the Guatemalan office of Porter Novelli;[8] and

- *Garrett Rush*: Valuation and Damages Expert; Founding Partner of Versant Partners, LLC.[9]

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[2] Witness Statement of Mr. Jorge Rodolfo Carraza Muralles, dated 2 June 2021 ("Carraza").
[3] Witness Statement of Mr. Hery Arodi Gálvez Rivera, dated 2 June 2021 ("Gálvez").
[4] Witness Statement of Ms. Telma García Recinos de Mocario, dated 2 June 2021 ("García").
[5] Second Witness Statement of Mr. Daniel Kappes, dated 10 June 2021 ("Kappes II").
[6] Second Expert Report of Dr. Mike Armitage and Dr. James Siddorn, dated 10 June 2021 ("SRK II").
[7] Second Expert Report of Prof. Mario Roberto Fuentes Destarac, dated 11 June 2021 ("Fuentes II").
[8] Expert Report of Ms. Margarita Mendoza Yaquián de Cordón, dated 11 June 2021 ("Mendoza").
[9] Second Expert Report of Mr. Garrett Rush, dated 11 June 2021 ("Versant II").

II. FACTUAL BACKGROUND

A. Claimants Invested In A Promising Gold Mining Project In Guatemala

15. In their Memorial, Claimants described the history of gold discovery and exploration activities at Tambor carried out by Radius and Gold Fields in 2000-2007, leading to Claimants' investment.[10] They further explained that they were well positioned to evaluate and develop the Tambor Project, given their decades of experience working on gold mining projects, including in Guatemala, following which Claimants decided to invest in Guatemala.[11]

16. In its Counter-Memorial, for the most part Guatemala ignores Claimants' description of the geology and extensive exploration of the Tambor Project, which were highly relevant for Claimants' decision to acquire Tambor. Instead, it employs a narrative of detailing and questioning legal and business (and, at times, personal) relationships and arrangements of the previous owners and operators of Tambor.[12] Many of these interjections bear no relevance to this dispute.

17. Guatemala, in particular, challenges whether Radius discovered *any* gold at Tambor in the early 2000s.[13] It also questions whether Gold Fields' operation of the Tambor Project in 2001-2003 bore any promising results, and asserts that Gold Fields' exit was a consequence of its negative assessment of Tambor.[14] Guatemala further disputes that the CAM Technical Report commissioned by Radius in late 2003 was properly conducted or showed any positive prospects for Tambor.[15] It then suggests that a 2004-2006 joint venture between Radius and Fortuna Ventures indicates that the Tambor Project was not attractive to third companies and not viable.[16] Guatemala also challenges whether Claimants had sufficient experience to develop the Tambor Project,[17] and questions whether Claimants exercised proper due diligence before making their investment.[18] Finally, Guatemala suggests that Radius' exit from the Tambor Project (in 2012, after selling its majority interest to

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[10] Clms' Mem. ¶¶ 12-13, 19-23; Kappes I ¶¶ 18-35; SRK I ¶¶ 16-24, 61, 68-72, 124-174.

[11] Clms' Mem. ¶¶ 14-18, 24; Kappes I ¶¶ 3-16, 29, 36-40.

[12] *See, e.g.*, Resp's C-M ¶¶ 19-44; *id.* ¶ 21 (noting that Mr. Ridgway, CEO of Radius at the time, had "connections in Guatemala" and worked with Mr. Robert Wasylyshyn, Radius' Vice President of Exploration, on other projects); *id.* n. 69 (noting that Mr. Ridgway lives in Guatemala and that his wife is a Guatemalan national).

[13] *Id.* ¶¶ 20-21.

[14] *Id.* ¶¶ 23-27, 33.

[15] *Id.* ¶¶ 28-32.

[16] *Id.* ¶ 34.

[17] *Id.* ¶¶ 2, 45-47.

[18] *Id.* ¶¶ 608, 611, 682-683, 863.

Claimants in 2009) was a reflection of its negative assessment of its prospectivity.[19] Each of Guatemala's assertions is baseless.

1. Studies Indicated That The Mine Could Be Profitably Developed

18. *First*, Guatemala sets the tone for its misleading narrative by stating that Radius "*allegedly* discovered gold" at Tambor in 2000.[20] To the extent that Guatemala questions whether any gold discovery was made, there is abundant evidence that Radius *did* discover and, subsequently, further prospected for gold at Tambor, including through the Tambor Joint Venture with Gold Fields.[21] Ultimately, Exmingua went on to mine, produce, and sell gold concentrate, having made 67 shipments of approximately 20 tons each by the time it shut down in May 2016.[22] For Guatemala to say that gold was "allegedly" discovered is fanciful.

19. Further, seemingly to cast doubt as to Radius' ability as an exploration company or the viability of the Tambor Project, Guatemala notes the price of Radius' shares as at December 2020, referring to it as penny stock.[23] While Guatemala attempts to cast aspersions on Radius (and, by extension, on the Tambor Project) by commenting on Radius' share price, it ignores that Radius has discovered a number of successful deposits, with a particular focus on Latin America.[24] Indeed, as Guatemala itself notes, Radius' founder "had substantial experience in Guatemala when he turned his attention to El Tambor."[25] And, as is apparent, Tambor was successfully developed by Claimants, confirming the viability of the Project.

20. *Second*, Guatemala questions whether Gold Fields' operation of the Tambor Project bore any promising results and asserts that Gold Fields' exit was a reflection of its negative assessment of Tambor.[26] Specifically, Guatemala suggests that the Gold Fields' exploration at Tambor "did not

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[19] *Id.* ¶¶ 39-42, 47.

[20] *Id.* ¶ 20 (emphasis added) (referring to Press Release, Radius, "Radius Closes Acquisition of Tambor Interest," dated 30 Mar. 2004 (C-0216)).

[21] Kappes I ¶ 22; Chlumsky, Ambrust and Meyer Technical Report ("CAM Report") dated 7 Jan. 2004, at 8.1, ¶ 8 (C-0039); Gregory F. Smith, Radius Explorations Ltd.: Technical Report on the Guatemalan Properties – Gold Fields Joint Venture, Marimba Joint Venture, Eastern Guatemala Projects dated 11 Jan. 2003, ¶ 5 (C-0040).

[22] Clms' Mem. ¶ 66; Kappes I ¶ 120; SRK I ¶ 27.

[23] Resp's C-M ¶ 20.

[24] Radius Gold Inc, Corporate Profile dated 2021 (C-0804).

[25] Resp's C-M ¶ 21.

[26] *Id.* ¶¶ 23-27, 33.

return eye-opening results," which resulted in its exit from the Project.[27] Guatemala's unsupported speculation is inaccurate.

21. Guatemala relies on the CAM Technical Report, issued following Gold Fields' exit, which states that Tambor did not meet Gold Fields' internal minimum reserve size of two million ounces.[28] As SRK explains, the investment threshold for major mining companies, such as Gold Fields, are often deliberately high in order to apportion their limited resources, meaning that at times they miss out on deposits which later prove immensely successful.[29] This is supported by the fact that there are multiple examples of projects that developed into successful mines after Gold Fields had exited.[30]

22. Here, moreover, Gold Fields' assessment of the deposit was based on only *three* targets on which it focused its exploration, compared to over a dozen of targets identified at Tambor.[31] As such, Gold Fields' assessment at the time of its exit did not speak to Tambor's potential *as a whole.*[32] Indeed, SRK observes that Gold Fields' assessment is consistent with its own assumptions and valuation for that portion of the Tambor Project.[33] Notably, moreover, when Gold Fields sold its interest in the Tambor Joint Venture, it retained shares in Radius, and by extension in the Tambor Project.[34] Accordingly, Gold Field's withdrawal from the Tambor Project did not reflect any lack of potential, as Guatemala erroneously argues, and, in any event, predated the development and operation of the Tambor mine and the demonstration that an economically-viable operation was indeed possible.[35]

23. *Third*, Guatemala questions whether the CAM Technical Report ordered by Radius was properly conducted and showed any positive prospects for Tambor.[36] Again, Guatemala's allegations are unsupported and wrong.

24. Following Gold Fields' exit, Radius procured a report analyzing the exploration carried out at the Tambor Project in 2000-2003.[37] That report (the CAM Technical Report) was issued in January

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[27] *Id.* ¶¶ 26, 33-35; Secretariat ¶¶ 63, 184.

[28] CAM Report dated 7 Jan. 2004, at 6.2 (C-0039).

[29] SRK II ¶ 114; *see also* Versant II ¶¶ 138-139.

[30] SRK II ¶¶ 165-166 (noting the Essakane, Burkina Faso; Meliadine, Canada; and Las Cristinas, Venezuela projects).

[31] SRK I ¶ 133; SRK II ¶ 164; Stephen R. Maynard, Tambor Joint Venture – Summary of Exploration Potential dated 18 Nov. 2003, at 5, Table 2; (C-0046); CAM Report dated 7 Jan. 2004, at 1.2, ¶ 1.4 (C-0039).

[32] SRK II ¶¶ 164-165.

[33] *Id.* ¶ 164.

[34] Kappes I ¶ 30.

[35] SRK II ¶ 114.

[36] Resp's C-M ¶¶ 28-32.

2004. It concluded that gold mineralization at Tambor was a classic example of orogenic lode gold deposits spanning over 13 gold-bearing mineral zones, with indicated and inferred resources on several deposits.[38] It estimated a total gold content at Tambor at 270,000 ounces, of which it reported approximately 58,000 ounces as "Indicated" and the remainder as "Inferred."[39] It also noted that that there was potential for this Mineral Resource to be doubled or even trebled following further exploration.[40]

25. While Guatemala attempts to discredit the CAM Technical Report by noting that Radius ordered it as part of its due diligence for a future share issuance, this does not change the nature of the report as being prepared to the standard of an independent report, as also confirmed by SRK.[41] And Guatemala's assertion that, several years after the CAM Technical Report was prepared, the definitions of terms used in the Report were changed by the international reporting standards is likewise irrelevant.[42] Accordingly, and as supported by SRK, the CAM Technical Report provided reliable insight into the prospectivity of the Tambor Project.

26. *Fourth*, Guatemala suggests that a 2004-2006 joint venture between Radius and Fortuna Ventures indicates that the Tambor Project was unattractive and not viable.[43] This is incorrect.

27. Guatemala appears to suggest that Fortuna Ventures only invested in Tambor because it was founded by Mr. Ridgway, as was Radius, and that it exited in early 2006 because it had formed a negative view of Tambor's value.[44] In that vein, Guatemala seems to suggest that the Tambor Project was only of interest to companies related to Radius, and that even these companies were unwilling to develop the Project. As with the others, this speculation is unsupported and unwarranted.

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[37] Clms' Mem. ¶ 22; Kappes I ¶ 33.

[38] CAM Report dated 7 Jan. 2004, at 1.1-1.2, ¶¶ 1.2-1.4 (C-0039).

[39] *Id.*, at 11.10, Tables 11-3 and 11-4.

[40] *Id.*, at 11.10, Tables 11-.3 and 11-4.

[41] Resp's C-M ¶¶ 27-31; CAM Report dated 7 Jan. 2004, at 2.1 (C-0039); SRK I ¶¶ 20-25.

[42] Resp's C-M ¶¶ 28-31. While Guatemala asserts that Radius allegedly mischaracterized the findings of the CAM Technical Report in its SEC Form 6K filing, the exhibit number to which Guatemala cites is not the SEC Form 6K (Resp's C-M ¶ 32, n. 45 (referring to "SEC Form 6K, Radius (Feb 18, 2004), at 7 (R-0014)")). Another exhibit of the same name and date but with a different exhibit number equally does not contain the document on which Guatemala bases its allegation ("SEC Form 6K, Radius (Feb 18, 2004), p. 7 (R-0009)" at Resp's C-M ¶ 34, n. 48). Claimants should not be required to survey all exhibits submitted by Guatemala to guess which document Guatemala bases its assertions on. Without reviewing the source for the alleged mischaracterization, Claimants cannot comment on Guatemala's assertions.

[43] Resp's C-M ¶ 34.

[44] *Id.* ¶ 34.

28. As set out by Versant in its first report, in late 2004, Radius entered into a joint venture with Fortuna Ventures regarding the Tambor Project,[45] which venture lasted just over one year, until early 2006.[46] Contrary to Guatemala's insinuations regarding Fortuna Venture's purported lackluster enthusiasm for Tambor, the reality was that, at the time of its exit, Fortuna Ventures was resource constrained and chose to put its funds into another project that had prospects of reaching a positive cash flow sooner than the Tambor Project.[47]

29. *Fifth*, Guatemala challenges whether Claimants had sufficient experience to develop the Tambor Project[48] and questions whether Claimants conducted proper due diligence before making their investment.[49] Guatemala's accusations are baseless.

30. Guatemala ignores the extent of Claimants' experience in the mining industry and attempts to minimize it by claiming that, prior to their investment in Tambor, Claimants had experience only in providing metallurgical engineering services to "true" mining companies[50] [and had never owned an operated a successful mine/mining company]. Respondent's denigration of Claimants and their experience is simply wrong.

31. By the time Claimants learned that Radius was selling Tambor and Claimants were ready to make an offer,[51] Claimants had several decades of experience in the mining industry as well as a long history of working in Guatemala and understanding the geology of the region, the legal framework governing permitting, and the technical practicalities of putting a mine into operation.[52] In particular, Claimants' work had encompassed all stages of a mining operation, from preparing feasibility studies, through engineering and construction, production, and closures.[53] KCA was and is well known as a company that provides functional, turnkey, operating projects.[54] Claimants also had invested in

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[45] Versant I ¶ 51; Press Release, "Radius & Fortuna Reach a Joint Venture Agreement on the High Grade Tambor Gold Project, Guatemala," *Radius*, 2 Dec. 2004, at 1 (C-0217).

[46] Versant I ¶ 51; Press Release, "Radius Reviews 2005 Exploration Results and Looks Forward to 2006," *Radius*, 12 Jan. 2006, at 4-5 (C-0218).

[47] Press Release, "Radius Reviews 2005 Exploration Results and Looks Forward to 2006," *Radius*, 12 Jan. 2006, at 4-5 (C-0218) (noting that "Fortuna were planning an extensive program of underground exploration to define the high grade gold mineralization at Tambor, but instead focused most of their efforts on bringing the Caylloma silver mine in Peru back into production."); Versant II ¶ 140.

[48] Resp's C-M ¶¶ 2, 45-47.

[49] *Id.* ¶¶ 608, 611, 682-683, 863.

[50] *Id.* ¶¶ 2, 45-47.

[51] Clms' Mem. ¶ 14; Kappes I ¶¶ 36-40.

[52] Clms' Mem. ¶¶ 17-18; Kappes I ¶¶ 7-13; Kappes II ¶¶ 5-21.

[53] Kappes II ¶¶ 5-13.

[54] *Id.* ¶¶ 6-8 (providing the example of Ocampo, Mexico, where over the course of 2004-2013, KCA carried out the project from preparation of a feasibility study, through the design, construction and start-up of a gold-silver production complex

several successful mining projects, which they later sold at profit.[55] With this expertise, Claimants were well placed to assess the potential of developing Tambor into a successful operation.

32. Guatemala also disregards the extent of Claimants' assessment of the Tambor Project prior to their investment. As detailed in the Memorial, Claimants received from Radius and reviewed several in-depth reports prepared by qualified geologists and a reputable firm, as well as other technical documents prepared by Gold Fields, including its reports about the Tambor Project and raw data.[56] Documents received from Radius confirmed that substantial exploration had been carried out at Tambor between 2000 and 2009.[57] This involved widespread rock, soil, and stream sediment sampling and trenching of anomalies in the west-central part of the Gold Belt, followed by initial drilling in 2000-2001.[58] The Tambor Joint Venture formed by Radius with Gold Fields undertook further extensive exploration activities in the Tambor area, in particular to the deposits in the Santa Margarita and the Progreso VII areas, in 2001-2003.[59] Results of that exploration were reflected in several reports commissioned by Gold Fields and then Radius and issued by several geologists (Stephen R. Maynard, George M. Smith, Gregory F. Smith) and an international mineral resources consulting and engineering firm (CAM) in 2003 and early 2004.[60]

33. Guatemala criticizes the credibility of the Maynard and CAM Reports,[61] asserting that, prior to issuing his Report, Mr. Maynard commented that "the geology of Central America is complicated."[62] Guatemala, however, fails to note that later in the same interview Mr. Maynard stated

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with a capital investment of US$104 million, up until when the first ore was mined and processed, after which KCA handed the operation over to its owners).

[55] Kappes I ¶¶ 12-13; Kappes II ¶ 12.

[56] *See* Kappes II ¶ 20; Stephen R. Maynard, Tambor Joint Venture – Summary of Exploration Potential dated 18 Nov. 2003 (C-0046); Gregory F. Smith, Technical Report on the Guatemalan Properties dated 11 Jan. 2003 (C-0040); Report dated 7 Jan. 2004 (C-0039); Gold Fields Laboratory Diagnostic Test Work on Gold-Bearing Samples From the Tambor Project in Guatemala dated 27 Mar. 2003 (C-0685); Email from David Cass (Gold Group) to Daniel Kappes (KCA) dated 28 Mar. 2008, attaching the Summary of Metallurgical Test Data on Laguna North Samples dated 7 Feb. 2003 (C-0686); Email from David Cass (Gold Group) to Daniel Kappes (KCA) dated 21 May 2008, attaching the Report on the metallurgical tests at Guapinol South dated 11 Feb. 2003 (C-0687); *see also* Clms' Mem. ¶ 24.

[57] Clms' Mem. ¶¶ 19-23; Kappes I ¶¶ 18-35; SRK I ¶¶ 16-20, 24, 63.

[58] Clms' Mem. ¶¶ 19-20; Kappes I ¶¶ 18-22; SRK I ¶¶ 16-20, 24, 63, Table 4-1 (setting out the exploration by Radius).

[59] Clms' Mem. ¶¶ 20-23; Kappes I ¶¶ 22-35; SRK I ¶¶ 16-20 (setting out the exploration in 2001-2003) and ¶¶ 133-137 (setting out fourteen targets identified across Tambor by 2003).

[60] Gregory F. Smith, Radius Explorations Ltd.: Technical Report on the Guatemalan Properties – Gold Fields Joint Venture, Marimba Joint Venture, Eastern Guatemala Projects dated 11 Jan. 2003 (C-0040); George M. Smith, Draft Summary Report, Tectonic Setting and Controls on Gold Mineralization, Tambor Orogenic Gold Belt, Guatemala. Report for Radius Exploration Ltd dated 12 Jan. 2003 (C-0048); Stephen R. Maynard, Tambor Joint Venture – Summary of Exploration Potential, dated 18 Nov. 2003, at 2 (C-0046); CAM Report dated 7 Jan. 2004, at 1.2-1.3, ¶ 1.5 (C-0039).

[61] Resp's C-M ¶¶ 26-28.

[62] *Id.* ¶ 26; Rob Robertson, "Gold Fields joins Radius in Guatemala," *The Northern Miner*, 13 May 2002 at 3 (R-0007).

that Gold Fields was "finding not just grammage grade but, locally, multi-ounce grades."[63] Further, SRK confirms the reliability of the Maynard Report's resource estimate.[64] Guatemala's criticisms of the CAM Report are equally groundless, as set out above.

34. Guatemala's selective take on facts and evidence is further highlighted by its noting that Radius' Vice President stated in a 2004 interview that Tambor is "not structurally or geologically straightforward."[65] What Guatemala omits to add is that, in the following sentence of that same interview, Radius' Vice President showed confidence in the Tambor Project, stating that he "believed that commercial production is possible within 12-24 months."[66]

35. Guatemala also chooses to ignore that, by 2007, Radius further progressed the to-date exploration with underground development, which showed that the mineralization was not just a surface phenomenon, and which increased the certainty of previous findings.[67] Instead of acknowledging this further exploration at Tambor, Guatemala comments on Radius' involvement in an unrelated project and on assignments of royalty interests in Tambor between consecutive royalty-holders.[68] If anything, these developments show that Radius was actively working on other projects while third parties continued to see Tambor as having commercial potential.

36. Thus, by the time Claimants were considering investing in Tambor in 2008, there was substantial data showing that the deposit was valuable and could be developed commercially.[69] Before committing to the Tambor Project, Mr. Kappes also visited Guatemala to further assess and discuss it with Radius, following which Claimants obtained further positive data from testing of the rock-chip samples gathered during the site visit, which were analyzed at KCA's laboratories.[70]

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[63] Rob Robertson, "Gold Fields joins Radius in Guatemala," *The Northern Miner*, 13 May 2002, at 3-4 (R-0007). Guatemala further quotes Mr. Maynard's statements that drilling at the Bridge, Sastre and Lupita zones "dashed market expectations," while neglecting to acknowledge that these zones do not form part of the Progreso VII or Santa Margarita license areas relevant in this Arbitration.

[64] SRK I ¶¶ 18-25; SRK II ¶ 34.

[65] Resp's C-M ¶ 34; Press Article, "Radius, Fortuna reach Tambor gold JV," *BN Americas*, 12 Feb. 2004 (R-0015).

[66] Press Article, "Radius, Fortuna reach Tambor gold JV," *BN Americas*, 12 Feb. 2004 (R-0015).

[67] Kappes I ¶ 35; SRK I ¶ 24; Press Release, "Radius's Tambor Exploration Adit Returns Additional Intercept of 65.6g/t Gold Over 4.45m," *Radius*, 22 Oct. 2007 (C-0056).

[68] Resp's C-M ¶¶ 35-37.

[69] Clms' Mem. ¶¶ 12-13, 19-23; Kappes I ¶¶ 18-35; SRK I ¶¶ 16-24, 61, 68-72, 124-174.

[70] Clms' Mem. ¶ 24; Kappes I ¶¶ 38-39; Kappes II ¶¶ 14-21; Email from L. Ramirez to D. Kappes and D. Croas dated 2 May 2008 (C-0061) (listing samples taken from Guapinol South, Poza del Coyote, and Laguna Norte); Email from D. Kappes to D. Croas and R. Adams dated 4 May 2008 (C-0062) (including a draft letter to S. Ridgway of Radius). Guatemala makes yet another empty complaint when it accuses Claimants of failing to conduct adequate legal due diligence and, instead, relying on the CAM Report, which states that it did not diligence "ownership or property boundaries." PO No. 6, Annex B, Guatemala's Request No. 16. There are no questions about the "property boundaries" of Exmingua's license areas or

37. Equally meritless is Guatemala's suggestion that Claimants failed to consider the socio-political situation in Guatemala.[71] By 2008, Claimants had almost a decade-long experience in Guatemala, having worked on the Glamis Cerro Blanco and the Glamis/Entre Mares Marlin mining projects.[72] Indeed, Claimants closely followed the developments surrounding the Marlin mine and when, in April 2008, Mr. Kappes travelled to Guatemala, he met with the Marlin mine's managers to learn more about their operations.[73] Contrary to Guatemala's insinuation,[74] Claimants had reasonable grounds for believing that the issues that the Marlin mine was facing at that time were unlikely to occur at Tambor or to prevent Tambor from becoming operational.[75]

38. In fact, in 2008, when Claimants decided to invest in Tambor, social conflicts were not inherent to mining projects in Guatemala, as Guatemala now suggests.[76] The mining industry in Guatemala looked promising, and there were several successful mining projects in the area surrounding Tambor, such as the El Sastre mine.[77] While Guatemala presents the El Sastre project as suffering from social conflict, it only refers to events in 2011,[78] three years after Claimants' decision to invest in Tambor.[79]

39. Satisfied with their review of the data and the results of the site visit, in June 2008 Claimants signed a letter of intent with Radius (the "2008 Letter of Intent."),[80] to acquire their investment in Exmingua.[81]

40. *Finally*, Guatemala wrongly claims that Radius' exit from the Tambor Project, after it sold its remaining interest to Claimants in 2012, was a result of its negative assessment of the Project.[82]

Exmingua's ownership of those licenses – and Guatemala has raised no such issues – so it begs the question of what, exactly, Claimants should have "discovered" with more "diligence."

[71] Resp's C-M ¶¶ 48, 608, 611, 863.

[72] Kappes I ¶ 36; Kappes II ¶ 16.

[73] Kappes II ¶ 17.

[74] Resp's C-M ¶¶ 48-52.

[75] Kappes II ¶ 18.

[76] *See* Resp's C-M ¶ 683.

[77] Kappes II ¶ 19.

[78] Resp's C-M ¶ 682; Press Release, "Locals Reject Construction of Mine El Sastre," *No A La Mina*, 17 June 2011 (R-0175); Press Release, "Police Break-Up Protest Against Guatemalan Mine," *Latin American Herald Tribune*, 17 June 2011 (R-0176).

[79] Kappes II ¶ 19.

[80] Clms' Mem. ¶ 24; Kappes I ¶ 39; Kappes II ¶¶ 14-21; Email from D. Kappes to D. Croas and R. Adams dated 4 May 2008 (C-0062) (including a draft letter to S. Ridgway of Radius); Letter of Intent between KCA and Radius dated 2 June 2008 (C-0063); News Release, "Radius Signs Agreement to Develop its Tambor Gold Deposit," *Radius*, *3* June 2008 (C-0064).

[81] *See infra* § II.A.2.

[82] Resp's C-M ¶¶ 39-42, 47.

Guatemala notes that, shortly before Radius' sale of the remainder of its Exmingua shareholding to Claimants, the "share price of Radius continued to fall," which Guatemala suggests was a result of the fact that "[t]he market did not react favourably to the start of construction and announcement of the plans" for Tambor.[83] Guatemala then implies that Radius' 2012 share sale was motivated by the June 2012 shooting of Ms. Yolanda Oqueli Veliz,[84] or by Radius' wish to dispose of "problematic assets."[85] Guatemala's insidious speculation is again unproven and wrong.

41. Notably, at the time of its exit Radius "remain[ed] optimistic that commercial production will be achieved at Tambor and [they] will be reimbursed for the investment [they have] made in the region since discovering gold at Tambor in the year 2000."[86] Radius also retained a significant exposure to the Tambor Project through the production royalties arrangement, which is hardly the behaviour of a partner looking to distance themselves from a project.[87] Guatemala does not explain, let alone provide support for, its assertion that Radius' share price at that time had a close, if any, correlation with the market's sentiments about Tambor; notably, Tambor was not the only project that Radius was invested in at the time.[88] Nor does Guatemala provide any evidence linking the shooting of Ms. Oqueli to the Tambor Project or to Radius' decision to sell. In fact, the document relied on by Guatemala undermines its unsupported suggestion.[89] Lastly, Guatemala itself concedes that its musings about Radius' exit from Tambor being purportedly prompted by anti-mining attitude is merely "speculat[ion]."[90]

42. As shown, Claimants' decision to invest in the Tambor Project was based on reliable data gathered by two respected mining companies during almost a decade of exploration, as reflected in several technical reports. Given their experience working on gold mining projects, Claimants were well positioned to evaluate and develop the Tambor Project, which they did.

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[83] *Id.* ¶ 39.

[84] *Id.* ¶¶ 40, 47.

[85] *Id.* ¶ 396.

[86] Press Release, "Radius Gold Sells Interest in Guatemala Gold Property," *Radius*, 31 Aug. 2012, at 2 (C-0223).

[87] *See infra* § II.A.2 (setting out the production royalty arrangement); Versant II ¶ 146.

[88] *See, e.g.*, Radius SEC Form 6K dated Jan. 2012, at 2 (R-0023) (listing projects in Eastern Guatemala (distinct from the Tambor Project)).

[89] Press Release, "Radius Gold Updates on Recent Events at the Tambor Joint Venture, Guatemala" *Radius*, 20 June 2012, at 1 (R-0028) (noting that Radius has "no idea what the shooting is related to and the circumstances are under investigation by the police, but regardless of the cause, nothing can be achieved by violence and we utterly condemn it," and adding that any speculation that the shooting was related to Radius are "ridiculous and completely untrue.").

[90] Resp's C-M ¶ 396 (also stating that, in 2007-2010, two communities, Sipicapa and Barillas, were "critical against mining projects" while omitting the fact that those communities are located 300km and 400km from Tambor, respectively).

2. Claimants Acquired Exmingua As The Operating Company To Develop The Progresso VII And Santa Margarita License Areas

43. In the Memorial, Claimants established that they acquired Exmingua from Radius over the period from 2008 to 2012 to secure all legal and beneficial rights, title, and interest in the Tambor Project in Guatemala.[91] In particular, Claimants set out that, further to the 2008 Letter of Intent, in 2009, Radius transferred to them 51% of the shares in Exmingua making them Exmingua's controlling shareholders, and, in 2012, they acquired the remaining 49% of Exmingua's shares from Radius.[92]

44. In its Counter-Memorial, Guatemala acknowledges that by 2012 Claimants attained full ownership of Exmingua, but questions whether Claimants acquired any partial shareholding in Exmingua from Radius prior to that point.[93] In particular, Guatemala appears to challenge the 2009 transfer of 51% of the shares, questioning whether Claimants expended "a minimum of US$ 6.5 million on exploration and development on the [Tambor] Project" within the timeframe set forth in the 2008 Letter of Intent.[94] Guatemala further questions whether Claimants made contractually-agreed payments to Radius, including production royalties.[95] In a similar vein, Guatemala questions whether "KCA, Radius or Exmingua" made production royalty payments to Minera del Sur, *i.e.*, the current holder of rights to production royalties from the Santa Margarita area.[96] Lastly, Guatemala questions whether production royalty payments were made to Royal Gold, *i.e.*, the holder of rights to production royalties from the Progreso VII area.[97] Guatemala's unsupported speculation is not only unwarranted, but also is legally irrelevant to any issue in dispute, including Claimants' ownership of Exmingua and standing as investors under the DR-CAFTA.

45. *First*, Guatemala's assertion that it was not until 2012 that Claimants acquired any shareholding in Exmingua is wrong.[98] As explained in the Memorial, Claimants obtained ownership of Exmingua as follows:

- On 22 January 2009, Claimants acquired Minerales KC, a Guatemalan company established to conduct Claimants' business with respect to Exmingua.[99] To the extent that

[91] Clms' Mem. ¶¶ 24-27; Kappes I ¶¶ 36-44.
[92] Clms' Mem. ¶¶ 24, 26; Kappes I ¶¶ 39, 42, 44.
[93] Resp's C-M ¶ 517; *see also id.* ¶¶ 38-44.
[94] *Id.* ¶ 517, n. 945.
[95] *Id.* ¶¶ 40-41, 44.
[96] *Id.* ¶¶ 22, 38, 44.
[97] *Id.* ¶¶ 25, 36-37, 39, 43-44.
[98] *Id.* ¶¶ 39, 517.

Guatemala asserts that there is no evidence that Claimants acquired Minerales KC,[100] that allegation is baseless and disproved by documents submitted by Claimants with their Memorial.[101] The Public Deed dated 22 January 2009 expressly states that that KCA and Mr. Kappes paid the capital contributions in cash in exchange for the title to and ownership of 100% capital of Minerales KC.[102] Mr. Kappes held (and continues to hold) 10% of the participation interest in Minerales KC, and KCA held (and continues to hold) the remaining 90%.[103]

- On 19 June 2009, Minerales KC acquired 88 shares of Exmingua (51%) from a company in the Radius group.[104]

- On 4 September 2012, pursuant to an agreement dated 29 August 2012, Minerales KC acquired a further 41 shares in Exmingua and Mr. Kappes acquired the remaining 43 shares in Exmingua.[105]

46. Accordingly, from June 2009, Claimants have held 51% of the shares in Exmingua through Minerales KC, and, from September 2012, Claimants obtained full ownership, held directly by Mr.

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[99] Clms' Mem. ¶ 26; Kappes I ¶ 42; Public deed 448242 dated 22 Jan. 2009 (C-0071).

[100] Although Guatemala does not challenge the acquisition of Minerales KC in its Counter-Memorial, it does so in its Replies to Claimants' Objections to Guatemala's Document Production Request 13. *See* PO No. 6 dated 15 Mar. 2021, Annex B, Request 13, at 22-23 (Guatemala notes that "[b]ank statements evidencing transfers between Claimants, and/or related entities and Exmingua serve to establish not only Claimants' allegation that Mr. Kappes directly owns 25% of Exmingua, and indirectly owns 7.5% through Minerales KC, which owns the remaining 75% of Exmingua, and that KCA indirectly owns 67.50%, through Minerales KC (Clms' Mem., ¶ 27), but also that the transfer and acquisition of ownership were indeed executed in exchange for monetary consideration. If there is no underlying monetary consideration to Claimants' acquisition of Exmingua, this would negate the existence of one or more elements of an investment as a jurisdictional requirement and, at the same time, impact the causation requirement to establish State responsibility.").

[101] Public deed 448242 dated 22 Jan. 2009, at 2-3 (C-0071) (indicating that the original members of Minerales KC, Mr. Jorge Asensio and Mr. David Croas, assigned all their rights in Minerales KC to KCA and D. Kappes, respectively, for monetary consideration); *see also* Public Deed 448105 dated 30 May 2008 (C-0805) (establishing Minerales KC with Mr. Jorge Asensio and Mr. David Croas as members, and attaching a confirmation of Minerales KC's entry into the commercial registry); Certificates for Minerales KC issued by the Commercial Registry of Guatemala dated 8 and 28 July 2008 (C-0806) (indicating that Minerales KC is registered in the Commercial Registry as a company, engaged in mining activities).

[102] Public deed 448242 dated 22 Jan. 2009, at 2-3 (C-0071) (noting that during the Special Meeting of the Members of Minerales KC held on 21 Jan. 2009, KCA paid Q 4,500 and Mr. Kappes paid Q 500 to Mr. David Croas and Mr. Jorge Asensio, respectively, following which Mr. David Croas and Mr. Jorge Asensio assigned the title to and ownership of their respective participation interests, represented by capital contributions, in Minerales KC to KCA and Mr. Kappes, respectively, and KCA and Mr. Kappes were recorded as owners of the capital contributions in Minerales KC's Memorandum of Association).

[103] Clms' Mem. ¶ 26; Kappes I ¶ 42. Minerales KC is a limited liability company and participation of each member is represented by capital contributions rather than shares. Accordingly, the references to the "shares" in Minerales KC in Claimants' Memorial should be read as references to Claimants' "capital contributions."

[104] Clms' Mem. ¶ 26; Kappes I ¶ 44; Exmingua Shares Registry, Certificate no. 3 (C-0072).

[105] Clms' Mem. ¶ 26; Kappes I ¶ 44; Purchase Agreement executed by and among Radius (Cayman) Inc., Minerales KC and KCA dated 29 Aug. 2012 (C-0073); Bank transfer confirmation dated 29 Aug. 2012 (C-0807) (noting a payment of US$ 100,000 from KCA to Radius); Exmingua Shares Registry, Certificates nos. 2 and 4 (C-0074) (indicating that, on 4 September 2012, Radius Cayman Inc. endorsed 41 shares of Exmingua to Minerales KC and Pedro Rafael García Varela endorsed 1 share of Exmingua to Mr. Kappes); Exmingua Shares Registry, Certificate no. 1 (C-0075) (indicating that, on 4 September 2012, Radius Cayman Inc. endorsed 42 shares of Exmingua to Mr. Kappes).

Kappes and indirectly by Claimants through Minerales KC.[106] This ownership structure has not changed.

47. Guatemala is therefore wrong when it asserts that, as of May 2012, Radius held 100% of Exmingua.[107] That assertion is disproved not only by the documents Claimants submitted with their Memorial as set out above,[108] but also by the very document Guatemala submits in support of that erroneous statement, namely, Radius' May 2012 Form 6K filed with the U.S. Securities and Exchange Commission.[109] Guatemala wrongly asserts that this filing shows that "Radius … still owned 100% of the project" as of that time.[110] That document says no such thing. It reports that Radius owned 100% of "HB property in Guatemala," which is the Holly-Banderas project where Radius made first gold and silver discoveries in 2002.[111]

48. *Second*, Guatemala questions whether Claimants invested US$ 6.5 million (*i.e.*, the "Minimum Expenditure") in Tambor in connection with Claimants' acquisition of 51% of Exmingua's shares, as stipulated in the 2008 Letter of Intent.[112] Guatemala claims that it is "without knowledge or information sufficient to form a belief that KCA Subco had expended the amount of US$ 6.5 million as stated in the Letter of Intent or if any amount was even expended."[113] Guatemala's insinuation is disingenuous and, in any event, legally irrelevant.

49. Guatemala's own expert, Mr. Rosen, notes that Radius' Financial Statements expressly confirm that "KCA had met its minimum annual required expenditures of US$ 1 million and US$ 1.5 million by 2 June 2009 and 2 June 2010 respectively" and that, as of 2011, "Radius disclosed that the

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[106] Shareholder register of Exmingua (undated) (C-0808) (noting that all shares in Exmingua are held by Minerales KC and Mr. Kappes); Exmingua share certificate No. 1 (C-0809) (noting entitlement to 42 shares in Exmingua); Exmingua Shares Registry, Certificate no. 1 (C-0075) (noting that Radius endorsed 42 shares to Mr. Kappes); Exmingua share certificate No. 2 (C-0810) (noting entitlement to 1 share in Exmingua); Exmingua share certificate No. 4 (C-0811) (noting entitlement to 41 shares in Exmingua); Exmingua Shares Registry, Certificates no. 2 and 4 (C-0074) (noting that Mr. Garcia Varela endorsed one share to Mr. Kappes and Radius endorsed 41 shares to KCA); Exmingua share certificate No. 3 (C-0812) (noting entitlement to 88 shares in Exmingua); Exmingua Shares Registry, Certificate no. 3 (C-0072) (noting that it was issued pursuant to the share issuance notice regarding 88 shares).

[107] Resp's C-M ¶ 39.

[108] *See also, e.g.*, Press Release, "Radius sells its interest in Gold Mine in Guatemala," *Radius*, 31 Aug. 2012, at (C-0223) (referring to Radius' sale and KCA's acquisition in 2012 of the "remaining interest" in Exmingua, implying that KCA previously had acquired an interest in Exmingua).

[109] Resp's C-M ¶ 39 (citing to p. 18[sic] of Radius' SEC Form 6K dated May 2012 (R-0023)).

[110] Resp's C-M ¶ 39.

[111] Radius' SEC Form 6K dated May 2012, at 8 (R-0023); *see also*, Press Release, "Projects – Guatemala Joint Venture Project," *Radius* (C-0813).

[112] Resp's C-M ¶ 571; Guatemala's Document Production Requests, Request 47; Letter of Intent between KCA and Radius dated 2 June 2008, Clause 4 (C-0063) (referring to an acquisition through a "KCA Subco" that was subsequently carried out by Claimants establishing Minerales KC as their Guatemalan vehicle for Exmingua's acquisition).

[113] Resp's C-M n. 945.

KCA option was in 'good standing.'"[114] Guatemala's alleged lack of "knowledge or information" thus is not shared by its expert. As Radius acknowledged, Claimants made the Minimum Expenditure investment towards Tambor by June 2011, that is, one year earlier than envisioned in the Letter of Intent.[115] Indeed, by June 2012 Claimants had substantially exceeded the required amount by expending approximately US$ 9.8 million (US$ 12.8 million at market billing rates).[116]

50. Further, and in any event, there is no doubt that Radius transferred 88 Exmingua shares (51%) to Minerales KC on 19 June 2009, and subsequently transferred the remaining 84 shares (49%) to Minerales KC and Mr. Kappes, as set out above.[117] Over the past decade, Radius has never raised any issue regarding the share transfers or the amounts invested by Claimants pursuant to their agreement. Rather, since the completion of the 2012 share transfer, Radius consistently has stated that it sold its entire shareholding in Exmingua to Claimants.[118] Radius likewise has accepted royalties and other payments, per the parties' agreement.[119] The 2008 Letter of Intent established a framework for the transfer of Radius' 51% interest in Exmingua to Claimants. Based on that framework, the parties carried out a number of steps – all to their mutual satisfaction – which resulted in Claimants' acquisition of 51% of the shares in Exmingua through Minerales KC, as supported by the share certificates.[120] Guatemala's desperate attempts to find fault with the share transfer are futile, not only because there were no irregularities, but also because Guatemala has no standing to challenge the manner in which Radius and Claimants structured their transaction.

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[114] Secretariat ¶ 90.

[115] Versant II ¶ 145, Appendix P.4 (relying on KCA Billing Summary Sheet Invoices (C-0938); Email from D. Kappes to R. Rushton (Radius) *et al*. dated 28 July 2011 (C-0814) (specifying expenditures on direct costs incurred in Reno (US$ 2.08 million) and in Guatemala (US$ 642,000), laboratory test work in Reno (US$ 231,000), land purchases in Guatemala (US$ 1.19 million), modular laboratory fabrication (US$ 312,000) and mill fabrication (US$ 2.15 million), and attaching summary sheets for KCA expenditures on the Tambor Project).

[116] Versant II ¶ 145, Appendix P.4.

[117] *See supra* § II.A.2; *see also* Exmingua Shares Registry, Certificate no. 3 (C-0072); Exmingua Shares Registry, Certificates no. 2 and 4 (C-0074); Exmingua Shares Registry, Certificate no. 1 (C-0075).

[118] Press Release, "Investments – Royalties," *Radius* (C-0815) (noting that "[i]n 2012, the Company sold its interest in its subsidiary Exploraciones Mineras de Guatemala S.A., which holds the Tambor gold project in Guatemala, to Kappes, Cassiday & Associates ("KCA"), giving KCA a 100% interest in the project."); Press Release, "Radius Gold Sells Interest in Guatemala Gold Property," *Radius*, 31 Aug. 2012 (C-0223).

[119] Bank transfer confirmation dated 29 Aug. 2012 (C-0807) (noting a payment of US$ 100,000 from KCA to Radius); Radius, Investments – Royalties (C-0815) (noting that "[c]ommercial production commenced in late 2014 and accordingly, in January 2015, KCA paid to the Company US$ 341,063 as settlement for the outstanding receivable balance. Future quarterly royalty payments will be based on the current price of gold at the time and the number of ounces of gold produced . . . . Receipt of royalty payments by the Company commenced during the third quarter of 2015. However, on May 11, 2016, KCA informed the Company that mining operations were suspended by the Supreme Court of Guatemala.").

[120] Exmingua Shares Registry, Certificate no. 3 (C-0072) (noting Minerales KC's entry as holder of 88 paid-in shares in Exmingua as at 19 June 2009); Exmingua share certificate No. 3 (C-0812) (noting entitlement to 88 shares in Exmingua).

51. *Third*, Guatemala further questions whether Claimants made contractually-agreed payments to Radius, including production royalties.[121] Guatemala's insinuations are baseless and, again, irrelevant to any legal issue in dispute in this Arbitration.

52. Under the 2008 Letter of Intent, there were no payments due directly from Claimants to Radius for the transfer of the ownership of 51% of the shares in Exmingua. Instead, as noted above, the parties agreed that, by June 2012, Claimants would expend in excess of US$ 6.5 million on exploration and development of Tambor, and that, once Exmingua commenced production, Radius would participate in profits.[122] Under the 29 August 2012 agreement between the parties to transfer the remaining 49% of Exmingua's shares, Claimants committed to making three types of payments to Radius:

- Because Claimants used Radius' premises in Guatemala for the first four years of their operations, the parties agreed that Claimants would cover Radius' office expenses totalling approximately US$ 400,000 (termed the "Advances").[123] Claimants made their first payment, in the amount of US$ 100,000, on 29 August 2012.[124] Claimants paid the balance of the Advances, in the amount of US$ 341,063, upon commencing the commercial production at Tambor – as acknowledged by Radius[125] and noted by Guatemala itself.[126]

- Upon commencement of commercial production at Tambor, Claimants agreed to make quarterly payments to Radius in accordance with a sliding scale depending on the price of gold and up to a maximum of US$ 10 million (termed the "Initial Phase Production Payments").[127] Radius noted in its 2015 and 2016 Financial Statements that it received the majority of the royalties due from KCA for the production.[128] No further payments

[121] Resp's C-M ¶¶ 40-41, 44; PO No. 6 dated 15 Mar. 2021, Annex B, Request 13, at 22-23 (questioning whether Claimants paid any "underlying monetary consideration" in connection with their acquisition of Exmingua).

[122] Letter of Intent between KCA and Radius dated 2 June 2008, Clauses 4 and 6 (C-0063).

[123] Purchase Agreement executed by and among Radius (Cayman) Inc., Minerales KC and KCA dated 29 Aug. 2012, Clause 1 (C-0073).

[124] Bank transfer confirmation dated 29 Aug. 2012 (C-0816) (noting a payment of US$ 100,000 from KCA to Radius); Purchase Agreement executed by and among Radius (Cayman) Inc., Minerales KC and KCA dated 29 Aug. 2012, Clause 1(a) (C-0073).

[125] Royalty Agreement between Radius, Minerales KC, D. Kappes, and Exmingua dated 12 Nov. 2015, at 6 (C-0077).

[126] Resp's C-M ¶ 44 (noting the payment of US$ 341,063); Consolidated Financial Statements for Radius Gold Inc., year ending 31 Dec. 2015, at 24 (R-0031); Purchase Agreement executed by and among Radius (Cayman) Inc., Minerales KC and KCA dated 29 Aug. 2012, Clause 1(b)(i) (C-0073); Press Release, "Radius Gold Sells Interest in Guatemala Gold Property," *Radius*, 31 Aug. 2012 (C-0223); Email from K. Bales (Goldgroup) to D. Kappes dated 16 Jan. 2015 (C-0817) (setting out the balance of US$ 341,065 "for advance owing to Radius").

[127] Purchase Agreement executed by and among Radius (Cayman) Inc., Minerales KC and KCA dated 29 Aug. 2012, Clause 1(b)(ii) (C-0073).

[128] Consolidated Financial Statements for Radius Gold Inc., year ending 31 Dec. 2015, at 24 (R-0031); Radius Gold, 2016 Annual Report, at 24 (C-0982) (noting slightly higher figures reported by Radius as paid by KCA).

were made after the shut down of the mine, leaving part of the production royalties due to Radius under the Initial Phase Production Payments.[129]

- After the Initial Phase Production Payments of US$ 10 million have been made, Claimants would make further quarterly payments to Radius in accordance with a sliding scale, depending on the price of gold (termed the "Second Phase Production Payments").[130] No payments are due to Radius under Second Phase Production Payments.

53. Accordingly, Claimants paid to Radius the Advances and a substantial part of the Initial Phase Production Payments and were on schedule for making the outstanding payments when production was shut down, which impediment was acknowledged by Radius.[131] Guatemala's allegations thus are not only meritless, but they have no bearing on Claimants' acquisition of their investment or any issue in dispute in this Arbitration.

54. *Fourth*, and in a similar vein, Guatemala notes that Exmingua has not made the "advance" payments arising out of Exmingua's acquisition in 2000 (*i.e.,* well before Claimants acquired any interest in Exmingua) of rights to Santa Margarita, "[e]ven as the production stage was underway."[132] Exmingua's acquisition of mining rights under the Santa Margarita exploration license was carried out through an assignment which stipulated that Exmingua would make certain payments, including production royalties, to the assignor.[133] Guatemala cites to a 2015 letter, in which it wrongly states that Minera del Sur, to whom the assignor transferred their rights, sought "advance" payments from Exmingua.[134] The letter, however, does not inquire about "advance" payments; it inquires about production royalties, which only become due once production on Santa Margarita commences.[135]

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[129] *See* Versant II n. 313 (noting that the amount of the royalty paid to Radius was US$ 603,630, leaving US$ 583,561 outstanding); *id.* Appendix Q.1 (same); KCA, Radius Royalty Information (C-0937) (same); *see also* Radius Gold, 2016 Annual Report, at 24 (C-0982) (noting slightly higher figures reported by Radius as paid by KCA); Consolidated Financial Statements for Radius Gold Inc., year ending 31 Dec. 2015, at 24 (R-0031) (noting prior figures reported by Radius as paid by KCA). Versant conservatively adopted the lower figures as paid.

[130] Purchase Agreement executed by and among Radius (Cayman) Inc., Minerales KC and KCA dated 29 Aug. 2012, at Clause 1(b)(iii) (C-0073).

[131] *See* Simon Ridgway, "Radius Gold Comments on Media Reports of Temporary Suspension of Mining Operations at KCA's Tambor Mine in Guatemala," *Canadian Insider*, 11 May 2016 (R-0032).

[132] Resp's C-M ¶¶ 38, 44.

[133] Kappes I ¶¶ 21, 23; Conditional Assignment of Mining Rights dated 21 Nov. 2000, Clauses 1-4, 9 (C-0041) (noting that Geominas, S.A. assigned its mining rights under the Santa Margarita exploration license to Exmingua, subject to retaining royalty rights); Amendment to the Conditional Assignment of Mining Rights dated 4 Oct. 2001 (C-0042) (extending the assignment to further areas).

[134] Letter from Minera del Sur, S.A. to Exmingua dated 6 Apr. 2015 (C-0045) (noting that Geominas, S.A. assigned its royalty rights to Minera del Sur, S.A. on 12 Dec. 2013).

[135] Conditional Assignment of Mining Rights dated 21 Nov. 2000, Clause 9 (C-0041) (titled "Production Royalties" stipulates that Exmingua shall pay "a royalty on production" if either "Unidad Tipo or Santa Margarita derive one or more Mining Exploitation Rights *and* these enter into production operations" and further notes that "[f]ollowing a suspensive period of four years, plus one month later, counted from the signing of this contract, EXMINGUA shall pay monthly to the

Guatemala's complaint that "there is no evidence that either Exmingua, Radius or KCA have made these contractually obligated payments" is thus another baseless and irrelevant assertion.[136]

55. *Fifth*, Guatemala questions whether production royalty payments were made to Royal Gold, *i.e.*, the holder of rights to production royalties from the Progreso VII area.[137] These royalties were paid on shipments made by Exmingua, in the amount of approximately US$ 235,000, but the payments stopped following the shut down of the Exmingua's operations, leaving the amount of approximately US$ 193,000 in arrears.[138]

B. Guatemala Approved Exmingua's Progreso VII EIA And Issued It An Exploitation License

56. As Claimants explained in their Memorial, Exmingua obtained approval for its Progreso VII EIA and an exploitation license for Progreso VII, on 23 May 2011 and 30 September 2011, respectively,[139] after receiving a favorable opinion from the MEM Legal Advisory Unit on 4 July 2011, with the approval of the Attorney General, stating that the Progreso VII mine was "in the interest of the country."[140] In particular, Claimants explained that Exmingua's EIA contained thorough environmental and social studies carried out in collaboration with Grupo Sierra Madre ("GSM"), a consulting firm specialized in environmental and natural resources management and duly registered with the Ministry of Environment and Natural Resources ("MARN") in Guatemala.[141]

57. Claimants also explained that, prior to approving Exmingua's Progreso VII EIA, the MARN requested clarifications ("*ampliaciones*") from Exmingua, including details of "the Public Participation process," together with supporting documents evidencing the activities carried out

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Assignor companies *whose license goes into production*, the sum of TEN THOUSAND UNITED STATES DOLLARS (US$10,000.00) (emphasis added)"; *see also* Amendment to the Conditional Assignment of Mining Rights dated 4 Oct. 2001 (C-0042).

[136] Resp's C-M ¶ 44. Indeed, in its letter, Minera del Sur notes that they are "certain that if the intention had been for [them] to be entitled to receive down payments on royalties until the Exploitation License was granted, that is what the contract would have clearly stated." Letter from Minera del Sur, S.A. to Exmingua dated 6 Apr. 2015, at 2 (C-0045).

[137] Resp's C-M ¶¶ 25, 36-37, 39, 43-44.

[138] Versant II ¶ 77, Appendix Q; Royal Gold Invoice dated 20 Nov. 2015 (C-0984); Exmingua Bank Statement, Nov. 2015 (C-0988); Royal Gold Invoice dated 3 Dec. 2015 (C-0983); Exmingua Bank Statement, Dec. 2015 (C-0986); Royal Gold Invoice dated 29 Apr. 2016 (C-0985); Exmingua Bank Statement, May 2016 (C-0987).

[139] Clms' Mem. ¶¶ 37-38;Resolution No. 1010-2011 of the Ministry of Environment and Natural Resources approving the Environmental Impact Assessment for Progreso VII ("MARN Resolution No. 1010-2011") dated 23 May 2011 (C-0212); Resolution No. 03394 of the Ministry of Energy and Mines dated 30 Sept. 2011 (C-0090).

[140] Clms' Mem. ¶ 38; Environmental Impact License issued by MARN dated 26 May 2011 (C-0084).

[141] Clms' Mem. § II.B; MARN Resolution No. 1010-2011 dated 23 May 2011, at 3 (C-0212) ("THIRD. CONSULTING FIRM. Pursuant to the Environmental License for Individual Professional Consultant Registration, License No. 011, the firm [GSM] is duly certified before this Ministry to prepare environmental assessment instruments.").

throughout that process, and that Exmingua addressed MARN's additional requests in an amendment to the EIA ("EIA Amendment"), which it filed on 12 April 2011.[142] In addition, Claimants observed that, on 23 May 2011, the MARN issued an approval notice for the Progresso VII EIA, in which it stated that public consultations had been "carried out in accordance with the terms of reference" provided by the MARN and that, as evidenced in the supporting documents annexed to the EIA, the public participants had in general expressed their agreement with the mining project.[143]

58. Notwithstanding the MARN's comprehensive review and approval of the EIA, the MEM's favorable opinion of Exmingua's license application, and the Attorney General's confirmation that the Progresso VII project was in the interest of the country, in its Counter-Memorial, Guatemala asserts that the EIA was of the "worst quality" and "so incomplete that it does not meet the standards of domestic law and international practice on the subject."[144] In this regard, Guatemala contends that the EIA did not accurately represent the mine's environmental impact and that Exmingua misrepresented or omitted key information.[145] In addition, Guatemala states that the EIA's social studies were inadequate.[146] According to Guatemala, the "EIA's [] deficiencies . . . destroyed any hope of gaining a social license."[147]

59. As demonstrated below, Guatemala's assertions are baseless, and amount to nothing more than hollow, *post-hoc* efforts to evade liability for its Treaty breaches. Exmingua fully complied with its obligations in respect of the EIA, including by conducting thorough environmental and social studies, and no Guatemalan administrative agency or court has ever found otherwise.

1. Exmingua And Its Consultant Conducted Thorough Environmental Assessments, Which The MARN Approved

60. Claimants explained in their Memorial that, in order to obtain a mining exploitation license, Guatemalan law required that Exmingua submit an EIA to the MARN containing a thorough assessment of the Project's impact on the environment.[148] Claimants further explained that, in June 2009, Exmingua hired GSM – a consulting firm registered with the MARN and specializing in

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[142] Clms' Mem. ¶¶ 34-36; Amendment to Progresso VII EIA dated 1 Apr. 2011 (C-0089).
[143] Clms' Mem. ¶ 37; MARN Resolution No. 1010-2011 dated 23 May 2011, at 3 (C-0212).
[144] Resp's C-M ¶¶ 5, 59, § VII.B.
[145] *Id.* § VII.B.
[146] *Id.*
[147] *Id.* ¶ 754.
[148] Clms' Mem. ¶ 29.

environmental and natural resources management – to assist in preparing the EIA.[149] As Claimants observed, Exmingua and GSM spent a year conducting exhaustive environmental studies and, on 31 May 2010, filed the EIA for Progresso VII.[150] Following the MARN's request for additional information and Exmingua's filing of an EIA Amendment, on 23 May 2011, the MARN issued an approval notice for the Progresso VII EIA.[151] As Claimants further observed, the MEM's Legal Advisory Unit then issued a favorable opinion on Exmingua's exploitation license application and, on 30 September 2011, the MEM granted Exmingua a 25-year exploitation license for Progresso VII.[152]

61. In its Counter-Memorial, Guatemala questions whether GSM was even licensed to prepare the EIA that it approved. It goes on to claim that, despite the MARN's comprehensive review and approval of the EIA, the EIA was "so incomplete that it does not meet the standards of domestic law and international practice on the subject"[153] and "should not have been approved."[154] Respondent, in particular, relies on the reports of Mr. Robinson and Dr. Moran, prepared in 2012 and 2014, in support of its claims that Exmingua's EIA was the "worst," because, among other things, it allegedly did not accurately represent the Project's impact on local water resources or provide baseline hydrology or geology studies,[155] did not consider cumulative impacts or consider alternatives,[156] and was missing mitigation and contingency plans.[157] These assertions amount to nothing more than *ex post* argumentation aimed at distracting the Tribunal from the key issue regarding Exmingua's Progresso VII EIA, *i.e.*, that the State—acting through the MARN—confirmed that the EIA complied with all applicable laws and regulations, and thus approved it.[158] In any event, Guatemala's assertions also are meritless.

62. *First*, Guatemala's attempt to impugn the credentials of Exmingua's consultant, GSM, and question its MARN certification reveals Respondent's desperation. In its Counter-Memorial, Guatemala asserts that GSM "claim[s] to be an environmental consultant"[159] And in its document

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[149] Clms' Mem. ¶ 29; MARN Resolution No. 1010-2011 dated 23 May 2011, at 3 (C-0212).

[150] Clms' Mem. ¶ 33; Environmental Impact Assessment for Progreso VII Project dated 31 May 2010 (C-0082) ("Progreso VII EIA").

[151] Clms' Mem. ¶ 37; MARN Resolution No. 1010-2011 dated 23 May 2011, at 3 (C-0212).

[152] Clms' Mem. ¶ 38; Resolution No. 03394 of the Ministry of Energy and Mines dated 30 Sept. 2011 (C-0090).

[153] Resp's C-M ¶ 5; *see also* Resp's C-M ¶ 59, § VII.B, ¶¶ 738-753.

[154] Resp's C-M ¶ 5; *see also* Resp's C-M ¶¶ 734-737.

[155] Resp's C-M ¶¶ 59, 756-761; Report by Robert Robinson dated 29 Dec. 2012 (R-0049) ("Robinson Report"); Report by Dr. Robert Moran dated 22 May 2014 (R-0051) ("Moran Report").

[156] Resp's C-M ¶¶ 747-748.

[157] *Id.* ¶¶ 762-763.

[158] MARN Resolution No. 1010-2011 dated 23 May 2011, at 3 (C-0212).

[159] Resp's C-M ¶ 52.

production requests, Guatemala alleges that Claimants "have not provided documentation that GSM was properly registered for the entire period it was working on the EIA."[160] As Claimants noted in their objections to Guatemala's document request, they submitted *with their Memorial* evidence of GSM's MARN certification.[161] Exmingua's consultant, GSM, is an established environmental management firm that has been registered with the MARN since 2006.[162] The MARN further confirmed in its 23 May 2011 resolution that GSM "is duly certified before this Ministry to prepare environmental assessment instruments."[163]

63. Further, although Guatemala asserts that GSM merely "*claimed* to be an environmental consultant"[164] and was a "consulting firm *allegedly* specializing in environmental and natural resource management,"[165] GSM is a respected consultant that, as shown above, was duly certified by the MARN to prepare environmental assessments. Founded in October 2003, GSM maintains offices in Mexico and Guatemala and provides professional advice, training, and technical support in relation to environmental management and economic geology.[166] GSM specializes in developing environmental and social management programs – including environmental and social impact assessment studies, risk analyses, baseline studies, and public consultations – and designing and implementing programs for natural resource management.[167]

64. For Exmingua's EIA, GSM's ten-member core team included highly qualified professionals, including four geologist engineers, a biologist, an ecologist, two environmental architects, an agronomist engineer, and an anthropologist. A list of their credentials was submitted with the EIA,

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[160] Procedural Order No. 6 dated 15 Mar. 2021, Annex B, Tribunal's Ruling on Respondent's Requests for the Production of Documents, at 45 ("Claimants' allege that 'in June 2009, Exmingua hired [GSM] – a consulting firm specialized in environmental and natural resources management duly registered with the [MARN] in Guatemala – to prepare an EIA for the Progreso VII and Santa Margarita mining projects.' Claimants have not provided documentation that GSM was properly registered for the entire period it was working on the EIA. This is material and relevant to whether the consultation process was carried out in accordance with local law.").

[161] Procedural Order No. 6 dated 15 Mar. 2021, Annex B, Tribunal's Ruling on Respondent's Requests for the Production of Documents, at 45.

[162] *See, e.g.*, MARN License No. 011 dated 28 Feb. 2006 (C-1021); MARN License No. 011 dated 13 Feb. 2007 (C-1022); MARN License No. 011 dated 19 Feb. 2008 (C-1023). As throughout these proceedings, it appears as if Guatemala is again trying to take advantage of and benefit from its own bureaucratic ineptitude, when it alleges that GSM was not registered "for the entire period" that the EIA was prepared. *See* Procedural Order No. 6 dated 15 Mar. 2021, Annex B, Tribunal's Ruling on Respondent's Requests for the Production of Documents, at 45. The MARN certifies consultants annually and, often does not renew the registrations until February or March, resulting in a brief lapse in registration at the beginning of each year. *See* Progreso VII EIA, at 543-553 (C-0082). In any event, it is only necessary for the consultant to be certified at the time it submits the EIA. *See* MARN Resolution No. 1010-2011 dated 23 May 2011, at 3 (C-0212).

[163] MARN Resolution No. 1010-2011 dated 23 May 2011, at 3 (C-0212).

[164] Resp's C-M ¶ 52 (emphasis added).

[165] *Id.* ¶ 204 (emphasis added).

[166] *See* GSM, Portfolio of Services (C-1024); Kappes I ¶ 48.

[167] *See* GSM, Portfolio of Services (C-1024).

and includes significant experience in hydrogeological studies, watershed management, and environmental impact studies related to mining projects.[168] The team comprised professionals holding, *inter alia*, "a Ph.D. in Biology from Harvard University," a "Ph.D. in Agricultural Sciences in the specialty of Water Quality," a "Master of Science [in] Geological Studies," a "Master's Degree in Environmental Studies," a "Master of Science in Water Resource Management and Hydrogeology," and "a degree in Anthropology," as well as "Geologist Technician [specialized in] spatial modelling and geoprocessing."[169] The team also included the founder of the Center for Environmental Studies at *Universidad del Valle de Guatemala* and the 2007 recipient of the Presidential Medal for the Environment.[170]

65. *Second*, Guatemala's assertions that the MARN and the MEM were "misled" to approve the EIA,[171] denigrates the competence of its own officials and ignores the comprehensive EIA review and approval process. The MARN is vested with authority to review and approve EIAs.[172] Within the MARN, the Directorate of Environmental Management and Natural Resources ("DIGARN") is responsible for preparing the terms of reference for EIAs, and for reviewing, analyzing and approving EIAs.[173] The MARN also contains environmental quality, legal, compliance, and social departments.[174] Officials at the MARN authorized to pronounce upon the EIA's compliance with applicable standards thus are qualified to do so. Furthermore, as part of the review process, the MARN may make a one-time request to the project proponent for further information, if necessary, and also may request the opinion of any other public entities to assist in its review of the EIA.[175] As discussed further below, there also are opportunities for input from the affected communities.[176]

66. Based on the information provided in the EIA, the audits and the opinions issued by other public entities, as well as any observations or objections from the public, the technical personnel of the MARN's DIGARN must prepare and submit a technical recommendation concerning its evaluation of the EIA and the MARN must issue a final decision approving or rejecting the EIA.[177] The review is conducted in accordance with the MARN's Technical Manual, and the final decision to

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[168] Progreso VII EIA, at 48-51 (C-0082).
[169] *Id.*
[170] *Id.*
[171] Resp's C-M ¶ 5.
[172] Environmental Assessment, Control and Monitoring Regulations, Art. 39 (C-0413); Fuentes I ¶ 11.
[173] *See* MARN Resolution No. 1010-2011 dated 23 May 2011 (C-0212).
[174] *See* MARN Organization Chart (C-0818).
[175] Environmental Assessment, Control and Monitoring Regulations, Arts. 39, 41 (C-0413); Fuentes I ¶ 11.
[176] Environmental Assessment, Control and Monitoring Regulations, Art. 72 (C-0413); Fuentes I ¶ 13.
[177] Mining Law dated 1997, Art. 45 (C-0186); Fuentes I ¶ 14.

approve or reject the EIA is made by the MARN's Environmental Advisory Unit.[178] After an EIA it approved, it is sent to the MEM, who must publish a notice of the pending exploitation license application in the Official Gazette and another newspaper of large circulation, so that any person who may be affected by the mining right application may object to it being granted "at any time prior to issuance of the granting resolution."[179]

67. Within this framework, Exmingua and GSM worked tirelessly to prepare the EIA for Progresso VII. In June 2009, Exmingua engaged GSM to assist in preparing the EIA.[180] In August 2009, Exmingua received the Terms of Reference for the Progresso VII EIA from the MARN and, shortly thereafter, GSM commenced work on the EIA.[181] GSM's work included preparing the technical environmental and social studies sections of the EIA, and attending meetings with the MARN during the review process.[182]

68. In particular, during 2009 and 2010, the core team from GSM, performed extensive work over a period of 17 months to prepare the EIA, which spans no less than *426 pages*, exclusive of annexes, and *903 pages* in total.[183] On 31 May 2010, Exmingua filed the EIA, as prepared by GSM, with the MARN.[184] In accordance with the Article 45 of the Mining Law, an edict was published (in a form standardized by the MARN) in a newspaper, informing the public that the EIA would be available for comment for 20 days.[185] No objections or complaints were received by the MARN during this period.[186] In the course of reviewing the EIA, in December 2010, the MARN informally requested clarifications ("*ampliaciones*") from Exmingua, which were formally notified to Exmingua by letter dated 22 March 2011.[187] Exmingua addressed MARN's additional requests in an amendment to the EIA ("EIA Amendment"), which it filed on 12 April 2011.[188]

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[178] Environmental Assessment, Control and Monitoring Regulations, Arts. 43, 45 (C-0413).

[179] Mining Law dated 1997, Arts. 45-46 (C-0186); Fuentes I ¶ 12.

[180] Kappes I ¶ 48.

[181] *See* Email from GSM to KCA dated 18 Aug. 2009 (C-0819).

[182] Kappes I ¶ 48.

[183] Progreso VII EIA (C-0082) (page count taken from Spanish original); Kappes I ¶ 49.

[184] MARN Resolution No. 1010-2011 dated 23 May 2011, at 1 (C-0212).

[185] Public Notice for EIA dated 27 May 2010 (C-0083); *see also* Fuentes I n. 18; Clms' Mem. ¶ 33; Mining Law, Art. 45 (C-0186).

[186] Fuentes I ¶ 15.

[187] *See* Letter from the Ministry of Environment and Natural Resources to Exmingua dated 14 Dec. 2010 (unsigned) ¶¶ 8, 12 (C-0086); Request for Amendments to the Progreso VII EIA dated 22 Mar. 2011 (C-0087); Clms' Mem. ¶ 34.

[188] Amendment to the Progreso VII EIA dated 1 Apr. 2011 (C-0089); Clms' Mem. ¶ 36.

69. On 23 May 2011, the MARN issued an approval notice for the Progreso VII EIA.[189] In the notice, the MARN observed that the Environmental Advisory Unit of the General Environmental Management and Natural Resources Office—*i.e.*, DIGARN—conducted an audit of the proposed mining project. As the MARN observed, an "[environmental impact] study was submitted and duly analyzed by the Environmental Advisory Unit of the General Environmental Management and Natural Resources Office of this Ministry, which [] found it complies with the applicable legal and technical [standards]."[190] Accordingly, DIGARN determined that the EIA "satisfies the essential requirements and recommend[ed] APPROVAL."[191] The MARN thus resolved that "the environmental impact assessment has been completed for the [Progreso VII] Project" and "the environmental impact assessment study . . . is hereby APPROVED."[192] As is clear, and contrary to Guatemala's assertion, the MARN concluded that the EIA complied with the relevant legal and technical standards following a comprehensive review.

70. *Third*, Respondent's complaint in its Counter-Memorial that, even if the EIA complied with Guatemalan law and was approved by the MARN, it is still deficient because it failed to comport with international standards is legally and factually baseless. According to Guatemala, "*to keep its word* to local and government stakeholders, Claimants *would have to follow* the IFC [Performance Standards] and Equator Principles."[193] Yet, the MARN never required adherence to these specific standards and principles. To the contrary, the MARN confirmed that the EIA "satisfies the essential requirements" and complies with the "applicable legal and technical [standards]," including the Constitution of Guatemala and the Environment Protection and Improvement Law, among others.[194] The IFC Performance Standards and Equator Principles, as Guatemala concedes, are "a *voluntary* framework."[195]

71. In any event, the EIA complied with the spirit of these standards and principles, notwithstanding Guatemala's assertions to the contrary.[196] As has been noted, the EIA team was comprised of highly qualified professionals—including no less than the founder of the Center for Environmental Studies at *Universidad del Valle de Guatemala* and the 2007 recipient of the

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[189] MARN Resolution No. 1010-2011 dated 23 May 2011, at 3 (C-0212); Clms' Mem. ¶ 37.
[190] MARN Resolution No. 1010-2011 dated 23 May 2011, at 5 (C-0212).
[191] *Id.* at 3.
[192] *Id.* at 5.
[193] Resp's C-M ¶ 738.
[194] MARN Resolution No. 1010-2011 dated 23 May 2011, at 3, 5 (C-0212).
[195] Resp's C-M ¶ 739.
[196] *Id.* ¶¶ 738-753.

Presidential Medal for the Environment.[197] Moreover, an examination of the headings of the Progreso VII EIA reveals that they line up well with the IFC Performance Standards.[198]

72. Further, Guatemala's recitation of the steps needed to satisfy the IFC Performance Standards and Equator Principles are in line with Exmingua's and GSM's work on the EIA. Indeed, this is precisely the work carried out in the EIA:

> *[T]he mining company must present an EIA that comprises an integrated assessment of physical, biological, and social environments potentially affected by the project. It usually involves the following components: a fulsome description of project activities; the establishment of an environmental and social baseline in the project area; the prediction of all potential project effects (positive and negative) – this step usually includes predictive modelling for noise, air quality, surface water quality and hydrogeology; a determination of significance of each project effect; and if an effect is considered to have led to significant impacts, the establishment of suitable mitigation measures; and monitoring plans to verity the predicted effects and associated mitigation measures.*[199]

73. Exmingua's EIA covered each of the these topics, including a detailed description of the physical, biological, socioeconomic, and cultural environment (Chapters 5, 6, and 7), Exmingua's project activities (Chapter 2), the project's environmental impacts (Chapter 9), the Project's influence on the environment and potential risks (Chapters 11 and 12), and a comprehensive environmental management plan (Chapter 10).[200]

74. *Fourth*, nearly *all* of Guatemala's criticisms of the EIA[201] rely exclusively upon two reports prepared by Robert Robinson ("Robinson Report") and Robert Moran ("Moran Report") (which are merely echoed by SLR[202]), whom Guatemala mischaracterizes as "independent reviewers."[203] They are not; they are ideologically-driven activists, who were engaged to prepare their Reports by anti-

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[197] Progreso VII EIA, at 48-50 (C-0082).

[198] *Compare* Progreso VII EIA § 7 (Description of the Socioeconomic and Cultural Environment) (C-0082) *with* IFC Performance Standards, at 1 (Social and Environmental Assessment and Management System), at 7 (Indigenous Peoples), at 8 (Cultural Heritage) (RPA-021); *compare* Progreso VII EIA § 10.6 (Occupational Health and Safety Plan) *with* IFC Performance Standards, at 2 (Labor and Working Conditions); *compare* Progreso VII EIA § 9 (Environmental Impacts and Mitigation Measures) (C-0082) *with* IFC Performance Standards, at 3 (Pollution Prevention and Abatement), at 4 (Community Health, Safety and Security) (RPA-021); *compare* Progreso VII EIA § 10.3 (Biodiversity Management Plan) (C-0082) *with* IFC Performance Standards, at 6 (Biodiversity Conservation and Sustainable Natural Resource Management) (RPA-021).

[199] Resp's C-M ¶ 743 (emphasis added).

[200] Progreso VII EIA (C-0082).

[201] Resp's C-M ¶¶ 738-753, 756-763.

[202] *See id.* ¶ 755.

[203] *Id*.

mining, anti-development NGOs that instigated protests against Exmingua and other mines. As disclosed in his biography, Mr. Robinson was invited to Guatemala by *Colectivo MadreSelva* ("MadreSelva") and the Pastoral Peace and Ecology Commission ("PPEC"), and "volunteer[ed]" "to evaluate various technical aspects of four *foreign-owned* mining projects operating or exploring in the country. . . . and environmental impact assessments by mining companies [] *approved by government agencies*."[204] Thus, NGOs targeted foreign-owned projects whose EIAs already had obtained government approval, and engaged Mr. Robinson to advance their cause.

75. MadreSelva was one of the instigators of the protests against Exmingua, and counts the violent leadership of "La Puya" among its supporters.[205] The group describes itself as working "in defense of the territory and natural assets" of Guatemala by "expressing the will, the struggle and the resistance of the peoples *against a model of accumulation that preys and plunders* . . . ."[206] It seeks to "neutralize the maneuvers of dispossession of the dominance system," strengthen "urban and rural, national and international alliances [] in the *socio-environmental struggle* [] for the defense of the territory," and describes itself as "a benchmark . . . in the defense of the country's natural assets . . . in the face of the *onslaught of an extractivist development model* that promotes the State and the powerful economic sector."[207] PPEC similarly identifies mining as a problem and "provides support to communities that are threatened [by] . . . megaprojects."[208]

76. Dr. Moran also is affiliated with MadreSelva, having produced for the organization several critical reports on the Marlin Mine in Guatemala, owned by Canadian-based Goldcorp.[209] These and similar reports he has prepared on other mining projects are available on the website of MiningWatch

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[204] Program Information, "Seminar on Extractive Industries and Sustainable Development?" *Instituto Centroamericano de Estudios Fiscales (ICEFI)*, 7 Apr. 2016, at 5 (C-0820) (emphasis added).

[205] Mendoza ¶¶ 42-55; *see also* Photograph of Madre Selva banner at protest site dated 28 Jan. 2013 (C-1032); Photograph of banner at protest site dated Nov. 2012 (C-0829); Letter from Human Rights Ombudsman dated 20 Dec. 2012; Madre Selva's Notification of Protests dated 18 Jan. 2016 (C-0875); Madre Selva post on Twitter dated 2 Mar. 2021 (C-1033).

[206] News Release, "Defense of the territory and natural assets," *Madre Selva*, 11 Aug. 2020 (C-0821) (emphasis added).

[207] *Id.*; News Release, "A little history," 12 Aug. 2020 (C-0823) (emphasis added).

[208] PPEC, *About us* (C-0824).

[209] News Release, "New Country, Same Story: Review of the Glamis Gold Marlin Project EIA, Guatemala," *MiningWatch Canada*, 12 Mar. 2005 (C-0825).

Canada.[210] Both Mr. Robinson and Dr. Moran also have produced other critical reports against mines in Guatemala.[211]

77. MiningWatch Canada also was involved in the protests against Exmingua, providing material and logistical support to the protesters.[212] That organization describes itself as "work[ing] in solidarity with Indigenous peoples and non-Indigenous communities" to "control the corporations," which, in its view, "dominate the [mining] sector" and have "*no regulations or controls* on their activities to prevent them from profiting from [] the environment, workers, indigenous peoples and human rights in host countries."[213] The NGO has published numerous incendiary news articles denouncing KCA and Exmingua.[214]

78. Statements by Mr. Robinson and Dr. Moran make clear that they are aligned with these NGOs in their ideological opposition to mining projects. Mr. Robinson, who also has made efforts to recruit others to the anti-mining cause,[215] has stated that he is "most disillusioned with the mining industry" and that he is "proud" that his work has led to "two communities [] stop[ping] the mines in their area and [that] two [communities] continue to take action against the other mines."[216] Further confirming his anti-development and anti-mining bias—and his failure to evaluate specific companies or projects on their merits—Mr. Robinson has stated that "*most* of the [mining] sites he has seen around the world *of course* [release] the waste rock, the tailings, the blastings, and the chemicals into the environment and create contamination;"[217] that "they will continue to release contaminates into the

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[210] *Id.*; Dr. Robert Moran, CAO Marlin Mine Assessment: Technical Responses dated 28 Sept. 2005 (C-0923). In addition, Dr. Moran has produced similar reports for Greenpeace and has advised Za Zemiata, a Bulgarian NGO, in their work with the local population against a planned gold mine in Kyrgyzstan. Press Article, "Canadian gold mining in Kyrgyzstan," *Ejolt*, 31 Jan. 2012 (C-0827); Robert Moran, "Predictions and Promises of a Flawed Environmental Impact Assessment," *Greenpeace Argentina Mineral Policy Center*, Mar. 2003, at 1 (C-0828).

[211] Program Information, "Seminar on Extractive Industries and Sustainable Development?" *Instituto Centroamericano de Estudios Fiscales (ICEFI)*, 7 Apr. 2016, at 6 (C-0820); Press Article, "Study presented regarding costs related to closing the Marlin Mine," *Network in Solidarity with the People of Guatemala,* 28 July 2011 (C-0924); Robert Moran, List of Publications (C-0925).

[212] Photograph of banner at protest site dated Nov. 2012 (C-0829).

[213] Press Release, "About us," *MiningWatch Canada,* undated (C-0752); Press Release, "Control the Corporations," *MiningWatch Canada*, undated (C-0830) (emphasis added).

[214] *See, e.g.*, News Release, "Guatemalan Indigenous Organizations File Mining Law Complaint to Inter-American Human Rights Commission," *MiningWatch Canada*, 6 Sept. 2013 (C-0831); News Release, "Guatemalan Government Moves to Expel Witnesses to Police Violence at US-Canadian Mine Site," *MiningWatch Canada*, 7 July 2014 (C-0832); News Release, "International Groups Denounce U.S. Mining Company's Multi-million Dollar Claim Against Guatemala and Express Solidarity with Communities Peacefully Defending Land and Life at 'La Puya'," *MiningWatch Canada*, 31 Jan. 2019 (C-0833).

[215] Rob Robinson, "Call for Volunteers – 1 week in Guatemala," *InterNACHI*, Oct. 2008 (C-0834).

[216] Ellen Potts, "From our members: Rob Robinson," *Population Connection*, (C-0835).

[217] Transcript, "Video of Hydrogeologist Dr. Robert Moran explains the dangers of goldmining on glaciers," *Vimeo*, Sept. 2011 (C-0836) (emphasis added).

environment for as long as one can imagine in the future;"[218] and that post-mine reclamation sites require "some kind of maintenance, *forever*" and "*clearly* [] regulators do not want to hear it."[219]

79. *Finally*, the criticisms set forth in the Robinson and Moran Reports and adopted by Guatemala's mining expert, SRL, wholesale without any independent analysis (or, indeed, expertise to conduct any such analysis), and echoed by Guatemala in its Counter-Memorial are baseless. This should come as no surprise, not only in light of the bias of the authors, but also simply by comparing the EIA—which comprised 444 pages along with 17 annexes totaling 903 pages[220]—with the Moran Report, which is a mere *6 pages*,[221] and the Robinson report, which is a mere *14 pages*.[222]

80. The EIA included, *inter alia*, detailed descriptions of the physical and biological environments (Chapters 5 and 6), a detailed analysis of the project's environmental impacts (Chapter 9), and a comprehensive environmental management plan (Chapter 10).[223] Contrary to Guatemala's assertions, the EIA thus presented a comprehensive analysis (without which it would not have been approved). For instance, Guatemala's contention, that the "EIA fails to include a proper baseline to adequately assess the impacts of the Project . . . which makes it nearly impossible to confirm the true nature of the impacts,"[224] and that "there was *no baseline study of geology or hydrology*"[225] in the EIA are patently false.

81. GSM analyzed the baseline physical environment in detail, including its geology, geomorphology, soils, hydrology, climate, air quality, and natural atmospheric, hydrological, and geological threats.[226] In addition, GSM's analysis of the baseline biological environment examined the species of flora and fauna in the area, with particular attention given to endemic species, species threatened with extinction, and species that serve as an indicator of the site's environmental quality.[227] With regard to the baseline geological study, Guatemala asserts, in particular, that the EIA did not include "information [or] examination of rock types," "mineralogy," "chemical composition of

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[218] Transcript, "Video of Hydrogeologist Dr. Robert Moran explains the dangers of goldmining on glaciers," *Vimeo*, Sept. 2011 (C-0836) (emphasis added).

[219] *Id.*

[220] Progreso VII EIA (C-0082).

[221] Moran Report (R-0051).

[222] Robinson Report (R-0049).

[223] Progreso VII EIA (C-0082).

[224] Resp's C-M ¶ 755.

[225] *Id.* ¶ 756 (emphasis added).

[226] Progreso VII EIA, at 138-245 (C-0082).

[227] *Id.* at 246-269.

rocks," or "mapping of [] minerals in the rock."[228] In doing so, Guatemala seemingly overlooks Chapter 5 (Description of the Physical Environment)—and, specifically, Sections 5.1 (Geology) and 5.2 (Geomorphogy)—which discusses the geological baseline in detail. These sections span 18 pages, and concern, *inter alia*, "local geological aspects" (comprising a 2.4 km^2 area around the site), noting, for example, that "the study area is underlain by amphibolites, phyllites, argillites and limestone . . . distributed in a strip that extends through the area with East-west direction, with schistosity diving to the southwest," and further noting that "these rocks are intruded by igneous rocks, granite and granodiorite."[229] The EIA then proceeds to "describe in sequential geological order" the "rock units identified in the study area."[230] The EIA also provides detailed information on the "mineralization in the study area"[231] and provides maps of this mineralization and corresponding soil distribution.[232]

82. In relation to the baseline hydrology study, Guatemala erroneously asserts that the EIA "does not make clear the interconnection between surface waters and groundwater flows," did not conduct "any testing to evaluate seasonal variability," did not evaluate "the existing pre-mining water quality," and provided "no description of the methods used for sample collection."[233] However, Section 5.5 of the EIA (Hydrology), which spans 44 pages, discusses the Project's baseline hydrology, including these issues.[234] The EIA discusses both "Surface Waters"[235] and "Underground Waters"[236] *as well as* the interaction between these two water flows under a separate heading concerning "natural hydric recharge."[237] As the EIA notes, "recharge was estimated" using the "Methodology of Schosindky, 2006," pursuant to which several variables were employed "to determine the potential water recharge in the area."[238] In addition, GSM acknowledges that "it is important to clarify that the [] flow[s] measured [refer to] a specific time," and, thus, it estimated annual fluctuations in flow rates using data published by the National Institute of Seismology Volcanology, Meteorology and Hydrology in

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[228] Resp's C-M ¶ 757.
[229] Progreso VII EIA, at 142-143 (C-0082).
[230] *Id.* at 143.
[231] *Id.* at 145.
[232] *Id.* at 146, 157, 161.
[233] Resp's C-M ¶ 758-759.
[234] Progreso VII EIA, at 170-214 (C-0082).
[235] *Id.* at 171.
[236] *Id.* at 181.
[237] *Id.* at 188.
[238] *Id.* at 189.

cooperation with the National Institute of Electrification, and also relied upon the flow of a permanent tributary, the Los Achiotes river.[239]

83. Further, Section 5.5.3 of the EIA (Water Quality) describes the process by which GSM "collected sufficient data with which variations in water quality could be evaluated . . . including those parameters that could be affected in the future by the activities of the mining project"[240] This included the creation of "8 water quality monitoring stations" "in the vicinity of the area where [Exmingua] wants to perform the extraction and processing of the ore; as well as the water used for consumption in the municipal seat of San José del Golfo."[241] The water quality baselines – listing results for 18 different elements – are summarized in several tables in this Section.[242]

84. Guatemala's assertion that the EIA failed to consider "cumulative impacts"[243] also is wrong. To conduct the environmental impact analysis, GSM relied upon the Methodological Guide for Environmental Impact Assessment,[244] which was developed by Vicente Conesa in 2003, and is among the most common and widely-accepted methodologies for evaluating environmental impacts of projects ("Conesa Methodology").[245] The Conesa Methodology permits an assessment of environmental impacts based upon cause-effect matrices, which assists in the prioritization of mitigation measures.[246] Because it converts non-quantitative manifestations of environmental impacts into numerical values using an electronic model, the Conesa Methodology provides high certainty in the identification of environmental impacts and reduces subjectivity.[247]

85. Contrary to Guatemala's assertion, the Conesa Methodology incorporates the cumulative effects of environmental impacts into its model by weighting each impact based upon whether, and the extent to which, it generates cumulative effects. As the EIA states in summarizing the Conesa Methodology, as applied in the EIA, "[w]hen an action has no cumulative effect, the effect is valued

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[239] Progreso VII EIA, at 178 (C-0082).

[240] *Id.* at 192.

[241] *Id.* at 193.

[242] *Id.* at 194. Guatemala also makes the statement that the Tambor Project is "within an arid belt," without providing any support, while also stating that "much of Guatemala receives high amounts of rain." Resp's C-M ¶¶ 19, 759.

[243] Resp's C-M ¶ 747.

[244] *See* Conesa, F. V., METHODOLOGICAL GUIDE FOR ENVIRONMENTAL IMPACT ASSESSMENT (2010) (1st ed. 2003) (C-0970).

[245] Progreso VII EIA, at 329 (C-0082); *See* Sylvia M. Villarreal-Archila, *Evaluation of a mitigation proposal on the final disposal of lead-based batteries and its environmental impact*, 23 ING. COMPET (2021) (C-0837).

[246] Sylvia M. Villarreal-Archila, *Evaluation of a mitigation proposal on the final disposal of lead-based batteries and its environmental impact*, 23 ING. COMPET 1, 2-3 (2021)(C-0837).

[247] *See* Progreso VII EIA, at 329-335 (C-0082).

as (1). If the effect is cumulative, the value increases to (4)."[248] Accordingly, the "weighted sum . . . will indicate the environmental factors that suffer in greater or lesser extent the consequence of the activity."[249] Consideration of cumulative effects thus is intrinsic to the EIA's impact analysis.

86. Similarly, Guatemala's critique that the EIA contains "an inadequate analysis of alternatives"[250] ignores those discussed Chapter 8 of the EIA (Selection of Alternatives). As this Chapter indicates, the EIA considered alternative locations, methods of extraction, methods of mineral processing, and uses of labor, and explains why the specific form for each was chosen.[251]

87. Lastly, Guatemala's assertion that the EIA is "completely devoid of a management plan for mitigating the risks of the Project" also is wrong.[252] The EIA contains an Environmental Management Plan ("EMP"), which is designed to prevent, control, mitigate, or minimize adverse environmental impacts.[253] The EMP comprises a number of subsidiary management plans, including those concerning biodiversity and forestry, chemical materials, mining, monitoring and environmental control, occupational health and safety, particle materials, hydrocarbon management, machinery and equipment, water runoff, and solid waste, as well as a technical closure plan and risk analysis and contingency plan.[254] As stated in the EIA, "[t]he Environmental Management Plan, including individual plans and measures of mitigation, [was] designed to be applied in each of the stages of the project (the construction, operation and technical closure). . . . [and] applied to direct the personnel of the project, and contractors and suppliers when they are carrying out activities."[255] The EMP in Chapter 10 of the EIA spans 65 pages and includes several sub-plans, which, in fact, include more specific management plans than were required by the MARN's terms of reference.[256] Each plan outlines its "objective" and identifies numerous detailed "lines of action."[257]

88. As a result of its analysis, GSM determined that 38% of the Project's negative impacts on the environment were low-importance impacts, 55% were medium-low importance impacts, and only 6%

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[248] *Id.* at 331.
[249] *Id.* at 333.
[250] Resp's C-M ¶ 748.
[251] Progreso VII EIA, at 326 (C-0082).
[252] Resp's C-M ¶ 746.
[253] Progreso VII EIA, at 330-413 (C-0082).
[254] *Id.*
[255] *Id.* at 350.
[256] *Id.* at 330-413; Email from GSM to KCA dated 18 Aug. 2009, attaching Terms of Reference (C-0819).
[257] Progreso VII EIA, at 352-353, 356, 358, 360, 394, 396, 397-398, 401-404, 408 (C-0082).

were medium-high importance impacts.[258] GSM further observed that half of the negative impacts would occur at the construction stage, and thus were short-term impacts.[259] GSM thus concluded that "the project is compatible with the environment" as long as mitigation measures are taken in accordance with an environmental management plan.[260]

2. Exmingua And Its Consultant Conducted Consultations And Completed Social Studies, Which The MARN Approved

89. As Claimants explained in their Memorial, Guatemalan law also requires that an EIA present social studies assessing the impact of the project on local communities.[261] As Claimants further explained, from January to February 2010, Exmingua—in collaboration with GSM—carried out consultations with communities located in the vicinity of the Project.[262] During these consultations, Exmingua provided details of the planned mine to the participants and responded to their queries.[263]

90. In addition, as Claimants explained in their Memorial, Exmingua's Progreso VII EIA filed on 31 May 2010 with the MARN included details of these consultations.[264] The MARN, in turn, requested clarifications from Exmingua in December 2010, including, *inter alia*, details of "the Public Participation process," together with supporting documents evidencing the activities carried out throughout that process, which Exmingua filed with the MARN as part of its EIA Amendment.[265] As Claimants further observed, on 23 May 2011, the MARN issued an approval notice for the Progreso VII EIA, in which it stated that public consultations had been "carried out in accordance with the terms of reference" it had provided.[266]

91. As with Guatemala's *post-hoc* criticisms of the EIA's environmental studies, Guatemala similarly ignores the MARN's review and approval of the EIA's social studies and, in its Counter-Memorial, advances baseless critiques of the consultations conducted with the local communities.[267] According to Guatemala, Exmingua's "social assessment in the EIA is inadequate" and the

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[258] *Id.* at 348.
[259] *Id*.
[260] *Id.* at 349-350.
[261] Clms' Mem. ¶ 29.
[262] *Id.* ¶ 30.
[263] *Id.* ¶ 32.
[264] *Id.* ¶ 33.
[265] *Id.* ¶¶ 34-36.
[266] *Id.* ¶ 37.
[267] Resp's C-M ¶¶ 704-714.

consultations process was "flawed and deficient."[268] Guatemala further asserts that the consultations improperly focused on "presenting the benefits of the project rather than reviewing and analyzing the potential negative impacts."[269] In addition, Guatemala asserts that the consultations "did not engage with the wider community," did not "meet international standards"— in particular because the consultations made "no effort [] to consult with indigenous populations"— and that the consultations "misrepresented the support the project enjoyed because [they] failed to consult beyond . . . three of the adjoining villages."[270] These assertions are incorrect, as demonstrated below.

92. *First,* contrary to Guatemala's assertion that Exmingua's consultations were "inadequate," "flawed," and "deficient," Exmingua's consultations with the communities surrounding the Progresso VII mine were conducted in accordance with the MARN's terms of reference, responded to the MARN's comments, and were approved by the MARN after its review and analysis.[271] As Ms. Mendoza—an expert with over 20 years' experience advising on the implementation of social management programs in Guatemala—explains, the "public participation process portion of the EIA . . . is the only legal instrument for social participation that to this day remains in force in Guatemala," and thus "this public participation process is the only such process in the country with an official regulation defining general guidelines for companies to implement."[272] As Ms. Mendoza further explains, the "public participation" requirement allows the MARN "to identify, understand, and manage the environmental impacts of the project to be carried out."[273]

93. The requirements for these consultations are set forth in the MARN's Terms of Reference for Guiding the Process of Public Participation ("Consultation Guidelines").[274] The Consultation Guidelines provide the "steps required to carry out a public participation program" and note that "the public participation program must be presented within the [EIA] to be analyzed as an integral part of that document."[275] The Consultation Guidelines also list the benefits of the public participation

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[268] *Id.* ¶ 764.

[269] *Id*.

[270] *Id.* ¶¶ 687, 691, 698, 705-719, 750, 764.

[271] Clms' Mem. ¶¶ 36-37; Amendment to Progresso VII EIA dated 1 Apr. 2011 (C-0089).

[272] Mendoza ¶ 20.

[273] *Id.* ¶ 18.

[274] *Id.* ¶ 24 (observing that "Article 72 of Government Resolution 89-2008 [Public Participation as a Requirement in the Development of Environmental Assessment Instruments] provides that a project proponent must involve the population 'in accordance with the terms of reference set by the Ministry of Environment and Natural Resources.'"); *id.* (observing that, in conducting its consultations, Exmingua was required to follow the 2004 Terms of Reference to Guide the Public Participation Process); MARN's Terms of Reference to Guide the Public Participation Process dated 2004 (C-0740).

[275] MARN's Terms of Reference to Guide the Public Participation Process dated 2004 (C-0740).

program for various stakeholders, provide a suggested sequence and recommended methods for public communication, and offer a guide for collecting and recording data from the program.[276]

94. Consistent with the Consultation Guidelines, GSM prepared a detailed "Strategy Plan to Understand Local Perception of The Population in Relation to the Progresso VII Project" ("Strategy Plan").[277] As noted in the Strategy Plan, the objectives of the consultations were: (1) "To make known the project activities, their potential impacts, and the environmental management plans to be implemented"; (2) "To know the expectations, fears and hesitations of information that the different groups have"; and (3) "Correct aspects of the project that pose an unacceptable risk to the population."[278] The Strategy Plan further noted that the consultations "makes it possible to know the attitudes, concerns and perceptions of the inhabitants of the area about the implementation of the project and the positive or negative transformations that it may generate."[279]

95. The Strategy Plan envisaged that, "to achieve the objectives … it is necessary to involve key actors within the identified rural and urban communities within the framework of the system of formally organized Development Councils [COMUDE and COCODE]," as well as the Municipal Mayors and the City Councils.[280] In particular, GSM wanted to "take advantage of the structure of the system of Development Councils" because "it is a system that allows the broad participation of civil society in the making of important decisions within the communities," and because the Development Councils "have[] a formal organization before the municipality of San José del Golfo and San Pedro Ayampuc."[281] The Strategy Plan also listed several pages of questions to be asked of the communities during these consultations.[282] As Ms. Mendoza observes, the Strategy Plan is a "valid[] [] method[] for the public participation process."[283]

96. As required by the Consultation Guidelines, GSM presented its Strategy Plan, as well as the details of the consultations carried out pursuant to that Plan, in the EIA.[284] In particular, Annex 15 of the EIA (Advisory Opinion Plan) contains GSM's Strategy Plan, interview questions, attendance lists,

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[276] *Id*.

[277] GSM, Strategy Plan to Understand Local Perception of The Population in Relation to the Progresso VII Project ("Strategy Plan") (C-0838); Progreso VII EIA, at 844 (C-0082).

[278] Strategy Plan, at 2 (C-0838); Mendoza ¶ 25.

[279] Strategy Plan, at 1 (C-0838).

[280] *Id.* at 2.

[281] *Id.* at 3.

[282] *Id.* at 7-10.

[283] Mendoza ¶ 25.

[284] Progreso VII EIA, at 844-848 (C-0082).

and sample questionnaires filled in by community members.[285] In addition, Section 7.5 of the EIA (Local Perception About the Project) lists each of the consultations conducted and provides specific information on the meetings, interviews, and focus groups held in the municipalities of San José del Golfo and San Pedro Ayampuc and the villages of La Choleña, Los Achiotes, and El Guapinol.[286]

97. As previously noted,[287] after Exmingua filed its EIA, the MARN requested clarifications ("*ampliaciones*") from Exmingua, some of which related to the public participation process.[288] In the EIA Amendment that Exmingua filed on 12 April 2011, Exmingua expanded on the information regarding the consultations provided in the EIA, updating the MARN on the activities that it had carried out with the local communities since the date of submission of the EIA.[289] These activities included a meeting with the municipal councils of San José del Golfo and San Pedro Ayampuc on 25 and 26 January 2011.[290] Exmingua then resubmitted its public participation plan together with supporting documents.[291] As Ms. Mendoza observes, in holding these additional meetings, Exmingua complied with the MARN's recommendation that project proponents "[m]aintain communication and coordination with the groups served in this process of [socialization] to discuss progress in the project management . . . [m]ainly with the municipal corporations, with whom one must work jointly."[292] After Exmingua submitted the EIA Amendment, the MARN requested no additional information.[293]

98. In the approval notice for the EIA, the MARN observed that the consultations had been "carried out according to the terms of reference."[294] As the MARN further observed, "an Opinion Consultation Plan has been prepared with regard to the development of the project" and the "plan included population groups, community leaders and local authorities (mayors of municipalities, municipal development councils [COMUDEs] and community development councils [COCODEs])."[295] In addition, the MARN observed that the consultations "used different social techniques such as open interviews, workshops and [Strengths, Weaknesses, Opportunities, and

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[285] *Id.* at 849-868.

[286] *Id.* at 288-303.

[287] *See supra* § II.B.1.

[288] Clms' Mem. ¶ 34; Letter from the MARN to Exmingua dated 14 Dec. 2010 (unsigned) ¶¶ 8 and 12 (C-0086); Request for amendments to the Progresso VII EIA from the MARN dated 22 Mar. 2011 (C-0087).

[289] Amendment to Progresso VII EIA dated 1 Apr. 2011 (C-0089); Clms' Mem. ¶¶ 35-36.

[290] Amendment to Progresso VII EIA dated 1 Apr. 2011, at 4-5 (C-0089).

[291] Amendment to Progresso VII EIA dated 1 Apr. 2011 (C-0089); Clms' Mem. ¶¶ 35-36.

[292] Mendoza ¶ 35; Progreso VII EIA, at 302 (C-0082).

[293] Mendoza ¶¶ 26-29.

[294] MARN Resolution No. 1010-2011 dated 23 May 2011, at 4 (C-0212).

[295] *Id.* at 2.

Threats] matrices."[296] The MARN also observed that "*most of the representatives were interested in and pleased at the existence of the project*" and that "*the COCODEs and the residents committee* in the project's area of direct and indirect influence [], in general, *agree with the performance of the project*."[297] The MARN thus "APPROVED" the EIA.[298]

99. Guatemala's assertion that Exmingua's consultations were "inadequate," "flawed," and "deficient" thus rings hollow. As Ms. Mendoza observes, "[b]y approving the EIA for Progreso VII [], the MARN confirmed that the public participation process carried out by Exmingua was sufficient and validated its scope and results."[299]

100. *Second*, Guatemala's assertion that the consultations improperly focused on "presenting the benefits of the project rather than reviewing and analyzing the potential negative impacts"[300] is incorrect. To the contrary, Exmingua's consultations were designed and implemented precisely "[t]o make known the project activities, their potential impacts, and the environmental management plans to be implemented," "to know the local perception of the population about the project," and "to know the attitudes, concerns and perceptions of the inhabitants of the area about the implementation of the project and the positive or negative transformations that it may generate."[301] In this regard, the EIA plainly records questions posed to the community concerning, *inter alia*, their "opinion on mining activity," the "positive and negative impacts it considers mining activity will generate," and "how the relationship between the company and the community should be maintained."[302]

101. Indeed, in line with the Strategy Plan, Exmingua, in coordination with GSM, conducted consultations with the municipalities of San José del Golfo and San Pedro Ayampuc and the villages of La Choleña, Los Achiotes, and El Guapinol in January and February 2010.[303] The consultations consisted of focus groups, direct interviews, presentations, and opinion polls.[304] Records were kept of the questions, suggestions, doubts, and opinions of the participants.[305]

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[296] *Id.*

[297] *Id.* at 2, 4-5.

[298] *Id.* at 5.

[299] Mendoza ¶ 25.

[300] Resp's C-M ¶ 764.

[301] Strategy Plan, at 1 (C-0838).

[302] GSM's Second Phase Report, at 1-2 ("Second Phase Report") (C-0742).

[303] *Id.* at 1.

[304] Exmingua conducted interviews with the community leaders and COCODEs of La Choleña, San José del Golfo, Los Achiotes, Guapinol and San Pedro Ayampuc on 5, 8 and 9 February 2010, interviews with key decision makers in San Pedro Ayampuc and San Jose del Golfo on 3 and 9 February 2010, and held presentations and focus group meetings in La Choleña,

102. In San José del Golfo — "given the level of organization and [community] participation in [the] municipality"— direct interviews were conducted with municipal representatives and community leaders, and members of other civic institutions, such as church leaders, health and education officials, police officers, and court officials.[306] GSM also delivered presentations to the municipal authorities, including the Municipal Development Council, as well as to members of the La Choleña COCODE.[307] Following these presentations, GSM conducted focus groups to learn more about the communities' expectations and concerns about the project.[308] The results of these consultations were summarized in GSM's Second Phase Report, which recorded the questions posed to the communities and the "match points" (common responses) to these questions.[309]

103. As GSM's Second Phase Report indicates, the communities of San José del Golfo and La Choleña supported the Project because it would "generate employment" and "reviv[e] the economy," and emphasized that Exmingua also should engage in "mitigation," "work transparently," and offer "benefits to the community."[310] In this regard, the communities specifically requested that Exmingua assist with "water projects" and provide medicines to the health center.[311] In addition, when asked whether the communities supported "the possibility of hav[ing] a mineral extraction and processing project in the area," they responded — "Yes"— because it provides "good opportunities and a source of work."[312] GSM and the Exmingua representatives also addressed the communities' concerns about the Project, including those regarding water usage, air pollution, deforestation, and the potential health impacts of the mine.[313] Following these consultations, "the majority of those present expressed their interest in the presence of the project."[314]

104. In San Pedro Ayampuc, consultations also were conducted with municipal representatives and community leaders, including the Vice-Mayor, City Council, Municipal Planning Office, and

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San José del Golfo, Los Achiotes, Guapinol and San Pedro Ayampuc on 28 January, 3, 5, 8 and 9 February 2010. *See* Second Phase Report, at 1 (C-0742); Mendoza ¶¶ 31-36.

[305] Second Phase Report, at 1 (C-0742).

[306] *Id.* at 2; Mendoza ¶ 40.

[307] Second Phase Report, at 2 (C-0742).

[308] *Id.*

[309] *Id.*

[310] *Id.*

[311] *Id.*

[312] Second Phase Report, at 4 (C-0742).

[313] *Id.* at 6 (C-0742); Mendoza ¶¶ 33-34.

[314] Second Phase Report, at 6 (C-0742).

Municipal Secretariat.[315] Further consultations were conducted with members of the villages of El Guapinol and Los Achiotes, including with COCODE representatives.[316] As noted in GSM's Second Phase Report, the consultations comprised discussions with "young people, elderly people, women, farmers and farm owners, which allowed a variety of opinions."[317] The consultations followed a similar format to those conducted with the communities of San José del Golfo and La Choleña.[318]

105. The communities of San Pedro Ayampuc, El Guapinol, and Los Achiotes also viewed mining activity as "positive" and considered it "necessary for the community."[319] The communities observed that "the project can [provide] many benefits," that "it will contribute to community development," and supported the fact that "there will be [] environmental recovery [work] in the project closure phase."[320] In addition, the communities observed that "the attitude of the mining company's people toward them has been positive," and that "they respect us," which is "important."[321] GSM and Exmingua also addressed the communities' concerns regarding the project's environmental impacts.[322] As the communities observed, these explanations "help[ed] to diminish [] negative opinions" generated by "information [] from other parts of the country where there is opposition to mining activity."[323] After comprehensive discussions concerning the project—including direct questions on the "negative aspects"[324] of the Project—the communities observed that "the project [was] welcome" and "agreed to give [their] support."[325]

106. *Third,* Guatemala's assertion that Exmingua "did not engage with the wider community"[326] is misplaced. As noted, the MARN approved Exmingua's consultation plan, including with respect to the communities with which it was engaging.[327] In fact, as discussed further below, the MARN recently questioned whether the MEM-led consultations to comport with ILO Convention 169 needed to be conducted in San José del Golfo (in addition to San Pedro Ayampuc).[328] Moreover, and contrary

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[315] *Id.* at 9 (C-0742).
[316] *Id.* at 12.
[317] *Id.* at 10-11.
[318] Progreso VII EIA, at 289-293 (C-0082).
[319] Second Phase Report, at 9 (C-0742).
[320] *Id.* at 13-14.
[321] *Id.* at 12.
[322] *Id.* at 11.
[323] Second Phase Report, at 15 (C-0742).
[324] *Id.* at 13.
[325] *Id.* at 11, 15.
[326] Resp's C-M ¶ 719.
[327] Strategy Plan (C-0838); Progreso VII EIA, Annex 15, at 843 (C-0082).
[328] *See infra* § II.D.4.

to Guatemala's contention, Exmingua's efforts to involve COCODE representatives in the consultations were an effective means through which to engage the wider community. Indeed, COCODEs are "representative local development organization[s] that promote[] economic, social, and cultural development within [the community]."[329] COCODE representatives are elected—with each family within a community normally allowed one vote—and are "tasked with identifying the needs of the community and developing programs or solutions to meet these needs."[330] As Ms. Mendoza observes, COCODE representatives are elected at the "General Community assembly," which is audited by the municipality.[331] In this way, the presence of COCODE at the consultations ensured that the interests of each family in the community was represented.

107. *Fourth,* Guatemala's assertion that the consultations did not "meet international standards"[332] also is wrong. The main thrust of Guatemala's invocation of these standards in the context of the consultations is that Exmingua failed to uphold these standards, because it purportedly did not "[i]nvolve Indigenous People's representative bodies" or attempt "to engage [Indigenous Peoples] as stakeholders in the process."[333]

108. As previously discussed, the IFC [Performance Standards] and Equator Principles—which Guatemala also seeks to apply to the EIA's social studies[334]—are inapplicable to the present dispute, as they are voluntary standards.[335] In any event, engaging in consultations through representative bodies is in line with IFC guidance.[336] As the IFC has observed, "it is not practical, and usually not necessary, to engage with all stakeholder groups with the same level of intensity all of the time;" companies thus should "[be] strategic and clear as to whom to engag[e] with and why, before jumping in," and thus consider consulting with "elected representatives of regional, local, and village councils."[337]

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[329] Garcia ¶ 8; Law of Rural and Urban Development Councils Decree 52-87 (C-0515).

[330] Garcia ¶ 8.

[331] Mendoza ¶ 38; Law of Rural and Urban Development Councils Decree 52-87 (C-0515); Decree No. 11-2002, Law of Rural and Urban Development Councils dated 2 Mar. 2002 (C-0839).

[332] Resp's C-M ¶ 736.

[333] *Id.* ¶¶ 751-752.

[334] *Id.* ¶¶ 738-753.

[335] *See* Mendoza ¶ 41.

[336] IFC, *Relations with the Community and Other Social Actors: Best Practices Manual for Companies Doing Business in Emerging Markets* dated 2007 (RPA-019).

[337] Mendoza ¶ 37; IFC, *Relations with the Community and Other Social Actors: Best Practices Manual for Companies Doing Business in Emerging Markets* dated 2007 (RPA-019).

109. In fact, as provided in the Law on Rural and Development Councils, in Guatemala, COCODEs are the *only proper mechanism* through which indigenous communities can be consulted.[338] This is confirmed by both a letter from the MEM to the Governor or the Department of Guatemalan[339] *and* in decisions of the Constitutional Court rendered in 2011 and 2015.[340] As the Court observed, the consultation of the indigenous Mayan, Xinca and Garifuna peoples on development measures may be done "through their representatives in the development councils."[341] As the Court further observed, this is especially true in the absence of "a legal or regulatory platform at the national level that appropriately and sufficiently regulates the consultation of indigenous peoples provided for in the [ILO Convention]."[342] By seeking out the COCODEs in the communities, Exmingua thus *was* involving Indigenous People's representative bodies.

110. Indeed, as Ms. García observes, "of the[] 42 COCODE representatives [in San Pedro Ayampuc], 15 representatives are from the indigenous community."[343] As Ms. García further observes, "[a]t each COCODE meeting, a translator is available to provide translation from Spanish to the indigenous language, as needed."[344]

111. Moreover, Guatemala has repeatedly taken the official position before the Inter-American Commission on Human Rights (IACHR) that consultations conducted as part of the EIA process satisfy the consultation requirement under ILO Convention 169.[345] As Guatemala observed in 2010, in accordance with Guatemalan law governing the EIA process, "it [is] mandatory to conduct a public participation process . . . . although [this] is not called a consultation, it is indeed a prior process in which notification was given that a mining project would be executed."[346] Guatemala further

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[338] Decree No. 11-2002, Law of Rural and Urban Development Councils dated 2 Mar. 2002 (C-0839); *see also* Fuentes II ¶¶ 54-83.

[339] Letter from MEM to Governor of Department of Guatemala dated 15 Nov. 2015, at 2 [at 2 ENG] (C-0664).

[340] Letter from MEM to Governor of Department of Guatemala dated 15 Nov. 2015, at 2 [at 2 ENG] (C-0664); Constitutional Court of Guatemala, Case No. 1072-2011, Decision dated 24 Nov. 2011, at 10 [at 10 ENG] (C-0659); Constitutional Court of Guatemala, Case No. 1149-2012, Decision dated 10 Sept. 2015, at 38 [at 1-2 ENG] (C-0663); *id.* at 46 n.2 (Concurring Opinion by Judge Roberto Molina Barreto); *see also* Fuentes II ¶¶ 78-80.

[341] Constitutional Court of Guatemala, Case No. 1149-2012, Decision dated 10 Sept. 2015, at 38 [at 3 ENG] (C-0663); *see also* Fuentes II ¶¶ 78-80.

[342] Constitutional Court of Guatemala, Case No. 1149-2012, Decision dated 10 Sept. 2015, at 38 [at 3 ENG] (C-0663); *see also* Fuentes II ¶¶ 78-80.

[343] García ¶ 9.

[344] *Id.*

[345] Fuentes II ¶¶ 54-56, 70, 74-77; Fuentes I ¶¶ 51-52; Inter-American Commission of Human Rights, Petition 1566-07, *Communities of the Sipakepense and Mam Mayan People of the Municipalities of Sipacapa and San Miguel Ixtahuacán v. Guatemala*, Admissibility Report No. 20/14 dated 3 Apr. 2014 ¶ 19 (CL-0225).

[346] Inter-American Commission of Human Rights, Petition 1566-07, *Communities of the Sipakepense and Mam Mayan People of the Municipalities of Sipacapa and San Miguel Ixtahuacán v. Guatemala*, Admissibility Report No. 20/14 dated 3 April 2014 ¶ 19 (CL-0225) (internal quotation marks omitted); Fuentes II ¶¶ 74-77.

observed in 2015 that "the environmental impact study [is] made public prior to granting the exploitation license . . . . according to [ILO] Convention [169] it does constitute a mechanism for providing prior information so anyone can oppose it should they feel it necessary."[347] Guatemalan's legal expert entirely ignores this,[348] while Guatemala makes the non-sensical assertion that "it is not true that Guatemala made this position public"[349] despite the fact that it did just that.

112. *Fifth,* Guatemala's further assertion that Exmingua "misrepresented the support the Project enjoyed because it failed to consult beyond . . . three of the adjoining villages"[350] is incorrect. As an initial matter, Exmingua consulted with the municipalities of San José del Golfo and San Pedro Ayampuc (the largest nearby municipalities) *and* the villages of La Choleña, Los Achiotes and El Guapinol (the three closest villages); Guatemala's assertion thus is patently false. Moreover, as set forth in Section 2.2 of the EIA (Geographical Local and Area of Influence of the Project), the Project's area of influence for purposes of the consultations was carefully defined "based upon the possible impacts and risks that may be generated by the project activities, both [] the physical-biological factors as socio-economic [factors]."[351] Table 3 of the EIA sets forth the factors that were considered in determining the Project's area of influence, including vehicle traffic, water flows, and nearby animal and plant life.[352] Based upon these factors, unsurprisingly, the three closest villages and the two most populous, nearby municipalities fell within the Project's area of influence.[353]

113. Finally, as Ms. Mendoza observes, although the MARN requested additional information from Exmingua during the process of reviewing the EIA,[354] which Exmingua provided,[355] the MARN did not "request [that Exmingua] elaborate on the geographic coverage of the public participation process."[356] Accordingly, the fact that the MARN "accepted the communities defined by Exmingua

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[347] Inter-American Commission on Human Rights, Petition 1118-11, *Maya Q'eqchi' Agua Caliente Community v. Guatemala*, Admissibility Report No. 30-17 dated 18 March 2017 ¶ 29 (CL-0282); Fuentes II ¶¶ 74-77.

[348] *See* Fuentes II ¶ 74.

[349] Resp's C-M ¶ 564.

[350] *Id.* ¶ 764.

[351] Progreso VII EIA, at 27 (C-0082).

[352] *Id.* at 37.

[353] *See id.* at 58.

[354] Letter from MARN to Exmingua dated 14 Dec. 2010 (unsigned) ¶¶ 8, 12 (C-0086); Request for amendments to the Progresso VII EIA from the MARN dated 22 Mar. 2011 (C-0087); Mendoza ¶¶ 26-29.

[355] Amendment to Progresso VII EIA dated 1 Apr. 2011 (C-0089); Mendoza ¶ 28.

[356] Mendoza ¶ 29.

as comprising the Project's area of influence" demonstrates that the MARN "was satisfied that the choice of communities was appropriate."[357]

C. Exmingua Successfully Operated The Mine For More Than A Year And A Half And Expected To Continue Expanding And Exploration

114. Following approval of its Progresso VII EIA and receipt of its exploitation license, Exmingua expanded its operations in Tambor and successfully operated the mine for more than a year and a half, steadily producing gold concentrate and demonstrating great potential. During this time, Exmingua complied with its environmental commitments and continued to provide generous support to the community. Guatemala's assertions to the contrary are baseless, as demonstrated below.

1. Claimants Secured Land Rights, Obtained A Construction Permit, And Hired Local Workers

115. In the Memorial, Claimants demonstrated that, after obtaining its EIA approval, Exmingua steadily moved forward with its preparations for exploration and eventual exploitation of Tambor.[358] In particular, Exmingua acquired the surface rights in the Progreso VII and Santa Margarita license areas from key local landowners.[359] It also obtained a construction permit to prepare the mining site for exploitation.[360] It further began to hire and train local residents, first to provide environmental controls and monitoring,[361] and later to work at the mine (including both the site and the laboratory), becoming one of the largest employers in the area.[362]

116. In its Counter-Memorial and Replies to Claimants' Objections to its Document Requests, Guatemala challenges many of these basic facts, raising groundless and sometimes contradictory assertions aimed at denigrating Claimants. Guatemala, for instance, accuses Exmingua in its Counter-Memorial of deceiving local landowners by allegedly promising them that the land they sold to Exmingua would be used for agricultural purposes,[363] while, later, in its Replies to Claimants' Objections to Guatemala's Document Production Requests, Respondent asserts that Claimants have failed to prove that they acquired *any* surface rights in the Progreso VII and Santa Margarita license

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[357] *Id.*
[358] Clms' Mem. ¶¶ 28, 55; Kappes I ¶¶ 41, 55-62.
[359] Kappes I ¶ 55.
[360] Clms' Mem. ¶ 39; Kappes I ¶ 56.
[361] Kappes I ¶¶ 57-58.
[362] Clms' Mem. ¶¶ 61, 67.
[363] Resp's C-M ¶ 695.

areas.[364] In its Counter-Memorial and, indirectly, in its Replies to Claimants' Objections to its Document Requests, Guatemala argues that Exmingua lacked a valid construction permit and accuses Exmingua of forgery.[365] With respect to the hiring of local workers, in its Replies to Claimants' Objections to its Document Requests, Guatemala asserts that Claimants have failed to prove that Exmingua hired *any* local residents to work at the mine,[366] while in its Counter-Memorial it contends that Exmingua employed only 94 employees, allegedly making only a limited contribution to the local community.[367] As shown below, Guatemala's allegations are wrong and unsupported by evidence.

117. *First*, Guatemala asserts, on the one hand, that Exmingua deceived local landowners by allegedly promising them to use the purchased land for agricultural purposes,[368] only to allege, months after the Counter-Memorial was filed, that there is no evidence of Exmingua having acquired any surface rights.[369] Both points are wrong and Claimants address them in turn.

118. Guatemala's allegation that "some landowners sold their land to Exmingua on the promise that it would be used for agricultural purposes"[370] is incorrect. Guatemala relies for its proposition on a single phrase from a local newspaper article, which states that unnamed local landowners allegedly had been "[told], sworn and promised" that Exmingua would use the purchased land to grow "coffee or beans or maize," only to discover in June 2010 that the land would be used for mining.[371] This is inconceivable and unsupported by facts surrounding Exmingua's acquisition of land plots.[372]

119. Contrary to Guatemala's accusations, and as Mr. Kappes attests, Exmingua was upfront when it negotiated the acquisition of land plots.[373] In fact, it often paid substantially above the market price, precisely because the owners of the land were aware that the land was to be used for mining.[374] Furthermore, it is absurd to conclude that landowners selling to a company called "Exploraciones Mineras de Guatemala" (*i.e.*, Guatemala Mining Explorations), which was printed in large letters on

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[364] PO No. 6 dated 15 Mar. 2021, Annex B, Request 9, at 17-18.
[365] Resp's C-M ¶¶ 208-214.
[366] PO No. 6 dated 15 Mar. 2021, Annex B, Request 34, at 53-55.
[367] Resp's C-M ¶ 643.
[368] *Id.* ¶ 695.
[369] PO No. 6 dated 15 Mar. 2021, Annex B, Request 9, at 17-18.
[370] Resp's C-M ¶ 695.
[371] *Id.* ¶ 695 (citing Oswaldo J. Hernández and José Andrés Ochoa, "Gold so Close to the Capital," *Plaza Pública*, 22 June 2012), at 1-2 (R-0039).
[372] *See also* Kappes II ¶¶ 27-28.
[373] *Id.* ¶ 28.
[374] *Id.*

each of the land contracts,[375] would believe that a mining company would use their land for agricultural production. This is all the more evident considering that the land had been subject to exploration activities, including rock sampling and drilling, by Radius and Golf Fields in the preceding decade.[376]

120. Further, Guatemala's later-raised allegation that Claimants failed to prove that Exmingua acquired any surface rights is simply incorrect and directly contravened by documents already in the record, as well as by Guatemala's implied admission in its Counter-Memorial that surface rights were purchased.[377] From the beginning, Claimants considered it best practice to acquire the relevant land rights as a matter of goodwill and to prevent any tension with the landholders, even though Exmingua could conduct licensed exploration and exploitation without acquiring any surface rights (as Claimants' predecessors-in-interest had done).[378] Accordingly, in 2008, Exmingua identified key landholders in the Progresso VII and Santa Margarita areas.[379] In October 2008, Exmingua acquired land from Isabel Morales, the largest landowner in the Guapinol and Poza del Coyote zones where Exmingua planned to commence mining.[380] Subsequently, Exmingua acquired land from three other major local landowners, Jorge Reyna in December 2008 and Delia Reyes and Efrain Catalan in November-December 2009.[381] Claimants also proceeded with the acquisition of key land plots in Santa Margarita and, in December 2008, Exmingua acquired land from Hugo Rosales, a major landowner in that area.[382] Exmingua prioritized the purchase of this land plot because it was located in the JNL West zone, which had been successfully drilled and sampled by Radius and Gold Fields.[383]

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[375] Contract for the purchase of land between Isabel Morales Veliz Viuda de Palencia and Exmingua dated 28 Oct. 2008 (C-0692); Contract for the purchase of land between Jorge Arturo Reyna Guzman and Exmingua dated 5 Dec. 2008 (C-0691); Contract between Delia Balbina Reyes Oliva and Exmingua dated 27 Nov. 2009 (C-0693); Contract for the purchase of land between Efrain de Jesus Catalan Alvarez and Exmingua dated 2 Dec. 2009 (C-0689); Contract for the purchase of land between Julio Hugo Rosales Alvarez and Exmingua dated 4 Dec. 2008 (C-0690).

[376] Kappes II ¶ 28.

[377] *See* Resp's C-M ¶ 695.

[378] Kappes I ¶ 55.

[379] Email from Hector Vaides to David Croas dated 14 July 2008 (C-0840) (attaching the list of 18 key landowners in the Progreso VII area).

[380] Clms' Mem. ¶ 56; Email from Hector Vaides to David Croas dated 14 July 2008 (C-0840) (noting that I. Morales is the largest landowners in the Progreso VII area); Contract for the purchase of land between Isabel Morales Veliz Viuda de Palencia and Exmingua dated 28 Oct. 2008 (C-0692) (attaching a wire transfer dated 29 Oct. 2008 and a map with coordinates).

[381] Contract for the purchase of land between Jorge Arturo Reyna Guzman and Exmingua dated 5 Dec. 2008 (C-0691) (attaching a wire transfer dated 5 Dec. 2008 and a map with coordinates); Contract between Delia Balbina Reyes Oliva and Exmingua dated 27 Nov. 2009 (C-0693) (attaching a wire transfer dated 25 Nov. 2008); Contract for the purchase of land between Efrain de Jesus Catalan Alvarez and Exmingua dated 2 Dec. 2009 (C-0689).

[382] Clms' Mem. ¶ 56; Contract for the purchase of land between Julio Hugo Rosales Alvarez and Exmingua dated 4 Dec. 2008 (C-0690) (attaching a wire transfer dated 4 Dec. 2008 and a map with coordinates).

[383] Kappes I ¶ 47.

121. Exmingua also maintained and entered into lease agreements for certain other parcels of land, with the intent to acquire the remaining surface rights as it developed the resources in those areas.[384] As a result, Exmingua acquired ownership of key land plots targeted for the first stages of development and operation of the mine, and leases over certain other plots. Guatemala's allegations to the contrary are wrong.

122. *Second*, Guatemala asserts that Exmingua acted unlawfully by engaging in construction without a valid permit, relying on a 13 July 2015 ruling of the Third Civil Court of First Instance of Guatemala, which found that Exmingua had not obtained a construction permit and ordered the Municipality of San Pedro Ayampuc to suspend construction at the mine and hold community consultations.[385] Guatemala is, again, wrong.

123. Exmingua applied for its construction permit on 8 November 2011, and that permit was granted by the Municipal Council, as reflected in a certification issued by the Municipal Secretary of San Pedro Ayampuc and counter-signed by the Mayor of San Pedro Ayampuc dated 15 November 2011.[386] On 21 December 2011, Exmingua paid the Municipality the fee for the permit, as shown by a receipt issued by the Municipality on that date as well as by a certified electronic copy of that receipt issued by the Municipality from its database on 27 January 2021.[387] Exmingua proceeded with and completed these steps although, as noted by Mr. Fuentes, it is uncertain whether, under the regulations in force at the time, municipalities even had the authority to issue construction permits and, if so, to charge fees for them.[388]

124. Following the grant of the permit, construction began in January 2012, but was soon suspended due to the first wave of protests, with works resuming after the blockade was lifted in late May 2014.[389] Construction was effectively completed before Exmingua commenced its mining

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[384] *Id.* ¶ 55.

[385] Resp's C-M ¶¶ 208-212; Judgment dated 13 July 2015, issued in Case No. 01050-2014-00871 by the Third Civil Court of First Instance of Guatemala, pp. 27-28, 31-32 [pp. 12-13 ENG] (R-0064).

[386] Kappes I ¶ 56; Application by Exmingua for a construction permit dated 8 Nov. 2011 (C-0091); Full Application by Exmingua for a construction permit dated 8 Nov. 2011 (C-0647); Construction permit dated 15 Nov. 2011 (C-0092); Fee payment for the construction permit dated 21 Dec. 2011 (C-0093).

[387] Receipt for payment of fee for construction license, issued on 21 Dec. 2011 by the Municipality of San Pedro Ayampuc to Exmingua (C-0093); Certified electronic copy of receipt of 21 Dec. 2011, issued on 27 Jan. 2021 by the Municipality of San Pedro Ayampuc (C-0648).

[388] Fuentes II ¶¶ 12-16 (noting that the uncertainly was caused by an amendment to Article 100(r) of the Municipal Code that became effective on 22 June 2010 and which removed the express reference to fees for construction permits as municipal income, and the subsequent reintroduction of such an express reference through an amendment to the same provision which became effective on 29 August 2012).

[389] Clms' Mem. ¶¶ 39, 41, 44; Kappes I ¶¶ 56-65, 73.

operations in October 2014.[390] The construction works were carried out at the site, in plain sight by Exmingua's contractors, P&F Contratistas and later LTE, using heavy construction equipment, between January and March 2012, and then from mid-2014 until late 2014.[391] Tellingly, at no point during that time did the Mayor or any other official from the Municipality of San Pedro Ayampuc raise any complaints about Exmingua's construction or make any claim that Exmingua was engaged in construction without a permit.[392]

125. It was only on 22 October 2014 – when the construction works at the site were all but finished—that the auxiliary mayors of two villages within the Municipality of San Pedro Ayampuc (but not the Municipality's Mayor) applied for an *amparo*, claiming that Exmingua had never been granted a construction permit.[393] Exmingua intervened in the proceeding as an interested party. CALAS, the same NGO that only a few months earlier, on 28 August 2014, had applied for an *amparo* against the MEM seeking the suspension of Exminuga's exploitation license,[394] also intervened in the proceeding as an interested party.[395] On 5 September 2014, the Supreme Court had suspended CALAS' *amparo* proceedings against the MEM (seeking to suspend Exmingua's exploitation license), holding that CALAS had not exhausted available ordinary remedies.[396] Within weeks from that (temporary) setback in its agenda,[397] CALAS became part of this *amparo* proceeding against Exmingua, this time challenging Exmingua's purported lack of a construction permit.

126. Exmingua, explained in the Court proceeding that it had obtained a permit and produced the certification of the minutes of the Municipal Council and the receipt for payment of the construction fee.[398] The Municipality of San Pedro Ayampuc then apparently submitted to the Court a different

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[390] Clms' Mem. ¶¶ 54-59; Kappes I ¶¶ 97-101.

[391] Kappes I ¶ 97; Kappes II ¶ 31.

[392] Kappes II ¶ 31. Guatemala asserts that, on 23 March 2012, the (provisional) Mayor of San Pedro Ayampuc stated that the records of the Municipal Council meetings do not include "an agreement on the approval of the infrastructure for mining operations in its communities." Resp's C-M ¶ 211. It is unclear who requested the referenced document and whether it even pertains to Exmingua. *See* Certificate issued by the Mayor of the Municipality of San Pedro Ayampuc dated 23 Mar. 2012 (R-0115) (noting that it was issued "[a]t the request of the interested party," which the document does not name or indicate, and stating that "there is no agreement that supports the infrastructure of mining operations" (in Spanish, "*que no aparece ningun acuerdo que avale la infra-estructura de explotactiones* [sic] [or: *exploraciones*] *mineras*")).

[393] Judgment of the Third Civil Court of First Instance of Guatemala dated 13 July 2015, Exp. 01050-2014-00871 (C-0918; R-0064).

[394] Clms' Mem. ¶ 70; Application by CALAS for *amparo nuevo* dated 29 Aug. 2014 (C-0137).

[395] Judgment of the Third Civil Court of First Instance of Guatemala dated 13 July 2015, Exp. 01050-2014-00871 (C-0918; R-0064).

[396] Clms' Mem. ¶ 73; Supreme Court Ruling dated 5 Sept. 2014 (C-0466).

[397] Regarding CALAS' *amparo* seeking suspension of Exmingua's exploitation license, *see infra* § II.D.1.

[398] Judgment of the Third Civil Court of First Instance of Guatemala dated 13 July 2015, Exp. 01050-2014-00871, at p. 27 (C-0918; R-0064).

extract of minutes of a Municipal Council meeting, which did not contain any mention of granting Exmingua a construction permit.[399]

127. On 13 July 2015, the Court granted the *amparo* and ordered the Municipality of San Pedro Ayampuc to suspend Exmingua's construction work at the mine site.[400] Guatemala's assertion that the judgment was issued "[u]pon analysis of the facts and documents" is belied by a review of the decision itself.[401] In a single sentence, the Court concluded: "the contradiction between the related minutes is more than obvious and as a result, the mining entity does not have a construction permit."[402] The Court did not provide any explanation for the supposed difference between the documents, nor did it address their relative probative weight or authenticity and the presumption of authenticity that generally applies to a certified extract, such as that submitted by Exmingua, as noted by Mr. Fuentes.[403] Thus, without any evidence or analysis, and on the sole basis that it had been presented with two different documents, the Court concluded that Exmingua lacked a construction permit and also referred the matter to the Public Prosecutor's Office for a criminal investigation.[404]

128. Notably, the judgment does not show any challenge by the Municipality to the authenticity of the permit fee payment receipt, nor does it reflect any consideration by the Court of its evidentiary weight.[405] And while Guatemala further asserts in its Counter-Memorial that the Municipality was unable to locate in its files any record of the grant of a construction permit to Exmingua in November 2020,[406] it is significant that the Municipality certified even more recently, on 27 January 2021, that it had received payment of the fee for the construction permit on 21 December 2011.[407] Finally, although the Court ordered the construction works to be suspended, by the time of the judgment, the construction works had long been completed – they had finished the year before.

129. On 6 February 2017, *i.e.*, long after the Guatemalan Courts had granted CALAS' *amparo* suspending Exmingua's exploitation license, the Constitutional Court affirmed the judgment which

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[399] *Id.* at p. 27 [p. 12 ENG].

[400] *Id.*, at 27-28, 31-32 [at 12-13 ENG].

[401] Resp's C-M ¶ 212.

[402] Judgment dated 13 July 2015, issued in Case No. 01050-2014-00871 by the Third Civil Court of First Instance of Guatemala, p. 28 [p. 13 ENG] (C-0918; R-0064).

[403] Fuentes II ¶¶ 22-23.

[404] Judgment dated 13 July 2015, issued in Case No. 01050-2014-00871 by the Third Civil Court of First Instance of Guatemala, pp. 28, 32 [p. 13 ENG] (C-0918; R-0064).

[405] Fuentes II ¶ 24.

[406] Resp's C-M ¶ 213; Report of the Municipality of San Pedro Ayampuc dated 20 Nov. 2020 (R-0116).

[407] Certified electronic copy of receipt of 21 Dec. 2011, issued on 27 Jan. 2021 by the Municipality of San Pedro Ayampuc (C-0648); Fuentes II ¶ 24.

Exmingua had appealed, but modified it by striking its referral to the Public Prosecutor's Office.[408] Guatemala's contention that "the way in which the alleged construction permit was obtained must be investigated"[409] is thus baseless: not only was the lower court's judgment contrary to the evidence and wholly lacking in analysis, but Guatemala had every opportunity to investigate the issue, but did not do so even when ordered by a Court. Indeed, even the Constitutional Court could not concoct any basis to uphold the reference of the matter to the prosecutor.[410]

130. *Third*, Guatemala's allegation that Exmingua hired only "94 employees and made limited contributions to the community"[411] is untrue. For support, Guatemala relies on the EIA for Progreso VII, which stated that "at least 94 jobs will be generated" at the operating stage of the development of the mine.[412] Exmingua provided this estimate, pertaining only to the operation stage, more than four years before the mine began to operate. In reality, Exmingua hired and trained more than 200 hundred local residents to work at the mine, including in the pre-operation stage, as set out below.

131. After Claimants' acquisition of Exmingua, Claimants gradually expanded Exmingua's operations at Tambor, including by steadily hiring and training local workers.[413] At the time of Claimants' acquisition of Exmingua, the company had fewer than ten employees.[414] Claimants soon began to increase that number, hiring several employees to prepare and maintain the land in preparation for mining, to ensure environmental control and monitoring, to plant and grow trees on the on-site nurseries, and to relocate the endangered plant species to a wildlife and plant reserve.[415] Exmingua's construction contractors (P&F and LTE) also hired local workers as part of their construction crews to work on the site.[416]

132. Once the construction works completed in October 2014, Exmingua began to hire hundreds of local residents to work various roles, from lorry drivers, cooks and office workers, to the employees who worked at the mine's plant and laboratory.[417] Exmingua also invested in the training of the mine's personnel, particularly where the job required knowledge and skills. For example, as Mr. Hery

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[408] Decision by the Constitutional Court in Case No. 3580-2015 dated 6 Feb. 2017, at 28-29 (C-0650).
[409] Resp's C-M ¶ 214.
[410] Fuentes II ¶¶ 25-27.
[411] Resp's C-M ¶ 643.
[412] *Id.* ¶ 643, n. 1198 (referring to Progreso VII EIA, at 23 (C-0082)).
[413] Clms' Mem. ¶ 67; Kappes I ¶¶ 43, 57-58, 97; Kappes II ¶ 34.
[414] Kappes I ¶ 43.
[415] Kappes I ¶¶ 57-58; Kappes II ¶ 34.
[416] Gálvez ¶¶ 6-8; Kappes I ¶¶ 57, 97.
[417] List of Exmingua Employees in 2011-2017 (C-0842).

Gálvez explains, Exmingua provided several months' long, paid on-the-job training for approximately twenty individuals to work at the mine's laboratory analyzing mining samples, so that Exmingua had real-time assays to guide the equipment as it began excavations.[418]

133. By the time of the shutdown of the mine in May 2016, Exmingua employed close to 200 individuals, the vast majority of whom came from the San José del Golfo and San Pedro Ayumpuc areas and were Guatemalan nationals, which made Exmingua one of the largest employers in these communities.[419] Regular employment and associated salaries, exceeding what workers would otherwise have been able to earn locally, greatly contributed to the wellbeing of Exmingua's local workers and their families and communities.[420] The improved financial situation of local workers also had a positive impact on the local businesses.[421]

134. Given the above, Guatemala's assertions that Claimants have failed to prove that Exmingua hired local workers, or that Exmingua only employed an insignificant number of local workers and made a limited contribution to the community are wrong.

2. Exmingua Complied With Its Environmental Obligations And Applicable Law

135. As Claimants explained in their Memorial, on 12 March 2012—after Exmingua received its exploitation license and during the blockade of the mine—a guided site visit of the mine took place, which was attended by, among others, the Vice-Minister of the MARN, six environmental technicians from the MARN, delegates from the MEM, and Congressman Mejía with three advisers;[422] following this visit, Congressman Mejía observed that activities at the mine were being conducted lawfully.[423] In addition, Claimants explained that, after the blockade was lifted, Exmingua operated the mine in accordance with its applicable law and regulations.[424] In this regard, Claimants observed that the by-product of its operations, such as rock and sand, was stored in deposits, as indicated in the EIA, and that Exmingua also constructed four tailings ponds, designed by KCA and a geotechnical consultant, to store the waste generated from separating the valuable fraction from the uneconomic fraction of an

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[418] Gálvez ¶¶ 8-9; Kappes I ¶ 102.
[419] List of Exmingua Employees in 2011-2017 (C-0842).
[420] Gálvez ¶¶ 8-10; Carraza ¶ 14; Garcia ¶ 31; *see also infra* § II.C.3.
[421] Gálvez ¶ 12.
[422] Clms' Mem. ¶ 45.
[423] *Id.*
[424] *Id.* ¶ 55.

ore body.[425] As Claimants further observed, Exmingua's plans had been outlined and approved in the EIA, and its practices were, in fact, more precautionary than usual.[426]

136. In its Counter-Memorial, Guatemala asserts that, due to Exmingua's purported neglect of international standards and best practices in the EIA, "it is no small wonder that Exmingua failed to comply with Guatemalan law after it started mining."[427] According to Guatemala, Exmingua did not take is promises and obligations seriously, and a February 2015 MARN inspection report demonstrates that Exmingua did not comply with its environmental obligations under Guatemalan law.[428] Guatemala further asserts that the MARN commenced administrative proceedings against Exmingua in 2016 as a result of this non-compliance.[429] Contrary to Guatemala's assertions, Exmingua took its environmental obligations seriously from the outset of construction and operations, and diligently addressed the findings in the February 2015 MARN inspection report, which were common findings for an initial inspection following the start of mining operations and comprised part of a collaborate process between Exmingua, the MARN, and the MEM.

137. *First*, Exmingua took its environmental obligations seriously from the outset of its activities. Indeed, shortly after construction began in early 2012, Exmingua—cognizant of its responsibility to protect the environment—employed sixteen people to provide environmental monitoring and ensure Exmingua's compliance with its environmental commitments.[430] Toward this end, in 2012, Exmingua relocated all endangered plant species from the Project site to a wildlife and plant reserve.[431] In addition, in Exmingua retained a renowned environmental expert, Dr. Michael Dix—the same environmental expert, founder of the Center for Environmental Studies at *Universidad del Valle de Guatemala*, and 2007 recipient of the Presidential Medal for the Environment that worked on the Progresso VII EIA—to continue working for Exmingua as an independent contractor.[432] Dr. Dix supervised a four-person crew, which was responsible for regular environmental monitoring and

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[425] *Id.* ¶¶ 57-58.

[426] *Id.* ¶ 58.

[427] Resp's C-M ¶ 766.

[428] *Id.* ¶¶ 713, 768.

[429] Clms' Mem. ¶ 769; MARN Document No. 475-2016/DCL/EOGP/mirf dated 24 Feb. 2016 (R-0187).

[430] Kappes I ¶¶ 57-58; Kappes II ¶ 34.

[431] Kappes I ¶ 58; Photos of Exmingua's reforestation project dated Oct. 2012 (C-0694); Dr. Dix, Report on Rescue and Reintroduction of Protected Species Project at Progreso VII dated Mar. 2012 (C-0697).

[432] Contract for the Environmental Impact Study for Santa Margarita Derivada, attaching the Economic Technical Proposal dated 23 June 2009, at 21 (C-0079); Environmental Impact Assessment for Santa Margarita presented by Exmingua dated 12 Sept. 2011, at 21-22 (C-0081); Progreso VII EIA, at 49 (C-0082).

mitigation work throughout the mine's operations.[433] This crew continued its work until Exmingua was shut down.[434]

138. In addition, Exmingua carried out extensive environmental monitoring of the water and air quality, as well as noise pollution, around the Project site.[435] Beginning in April 2014, Exmingua hired *Asesoría en recursos Naturales y Constructora Sociedad Anónima* ("ARNC") to carry out this monitoring in accordance.[436] As the monitoring reports reflect, ARNC's engineers were registered with the MARN, and the water, air, and noise monitoring was carried out in accordance with standards set forth by the World Health Organization, the United States Environmental Protection Agency, and the American Public Health Association, among others.[437] Each ARNC report is extensive, spanning over 300 pages.[438] In addition, in each report, the water, air, and noise quality was found to be within allowable limits.[439]

139. *Second,* Exmingua responded promptly to the MARN and the MEM's inspection reports and diligently addressed outstanding issues. In February 2015, after Exmingua had been operating for a few months, the MARN conducted an initial inspection of the Project site.[440] As noted in its February 2015 inspection report, the MARN examined nearly 200 aspects of the Project site.[441] This included, *inter alia*, whether "safety signs [are] posted," "a first aid kit [is located] in each work area," "the sterile material deposit [is] . . . at least 25m away" from the stream, a "mesh fence" is installed near the tail piles "to prevent the entry of wildlife species," trees are planted "as natural barriers to dust dispersal," personnel "had all the personnel protective equipment that is necessary," and the site had a "camp or dining room."[442] For each point, the MARN observed whether Exmingua "complies,"

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[433] *See*, *e.g.*, Report on the rescue and reintroduction of protected species at El Tambor dated Mar. 2012 (C-0697); KCA report "Progreso VII – Resume of Work Performed during 2012" dated 27 Jan. 2013 (C-0521).

[434] Email from H. Vaides to D. Kappes dated 19 Apr. 2016, attaching Proposal of Dr. Dix (C-0843).

[435] ARNC Report on the Water and Air Monitoring for the Second Trimester dated July 2014 (C-0844); ARNC Report on Quality of Air, Sound and Water in July-September 2014 dated Oct. 2014 (C-0845).

[436] ARNC Report on the Water and Air Monitoring for the Second Trimester dated July 2014, at 4 (C-0844). As the first report reflects, monitoring was not carried out during the first part of 2014 because of "opposition groups . . . in the area" that "[Exmingua] decided not to confront." *Id.*

[437] ARNC Report on the Water and Air Monitoring for the Second Trimester dated July 2014, at 5-6 (C-0844); ARNC Report on Quality of Air and Water in July-September 2014 dated Oct. 2014, at 5-6 (C-0845).

[438] ARNC Report on the Water and Air Monitoring for the Second Trimester dated July 2014 (C-0844); ARNC Report on Quality of Air, Sound and Water in July-September 2014 dated Oct. 2014 (C-0845).

[439] ARNC Report on the Water and Air Monitoring for the Second Trimester dated July 2014, at 28, 77 (C-0844); ARNC Report on Quality of Air and Water in July-September 2014 dated Oct. 2014, at 29, 66 and 88 (C-0845).

[440] MARN Technical Report dated 23-27 Feb. 2015 (R-0105); MEM Report on 23-27 Feb. 2015 inspection dated 12 Mar. 2015 (C-0627).

[441] MARN Technical Report dated 23-27 Feb. 2015 (R-0105).

[442] *Id.* at 20, 23, 24, 26, 35, 44, 61.

"fails," or whether the aspect does "no[t] apply."[443] Consistent with its stated objective, the report thus "indicate[d] the current status of the [Progresso VII] Project."[444]

140. That same month, the MEM also conducted its own inspection of the Project site.[445] In its report, the MEM observed the current operation of the mine and described the mining pits, processing site, waste disposal protocol, current infrastructure, and ongoing reforestation program.[446] The MEM observed that exploitation work had started at the mine; the plant was processing 200 to 250 tonnes of material per day; the sterile rock was being transferring to covered pools; that management of solid and residual waste from mining was underway; and a nursery had been created to assist with reforestation.[447] Throughout the report, the MEM also noted several "Opportunit[ies] for Improvement" and concluded its report with "Recommendations."[448] These included "*continuing* with the application of mining techniques appropriate for exploitation," "installing [perimeter railings] in the area where the tail collections pits are located," "*implementing* constant control and monitoring in the tailings collection pools," and "*expanding* the safety and signaling in the different work areas."[449] As these reports indicate, the MEM and the MARN understood that Exmingua would be continuing to address issues as its operations expanded.

141. By October 2015, shortly after receiving a copy of the MARN's report,[450] Exmingua had prepared a detailed list of steps required to address outstanding issues.[451] These steps were organized by department and contained a checklist to ensure that each issue was dealt with.[452]

142. On 26 November 2015, the MARN and the MEM carried out an additional inspection of the Progresso VII site.[453] Notably, in its Counter-Memorial, Guatemala *fails to mention this follow-up inspection*, instead focusing entirely on the initial February 2015 inspections.[454] As the MARN observed in its report, the purpose of this latter inspection was to "know the progress or status of

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[443] MARN Technical Report dated 23-27 Feb. 2015 (R-0105).
[444] *Id.* at 4.
[445] MEM Report on Inspection of 23-27 Feb. 2015 dated 12 Mar. 2015 (C-0627).
[446] *Id.* at 11-18.
[447] *Id.* at 5.
[448] *Id.* at 22.
[449] *Id.* (emphases added).
[450] Email from Maria del Carmen Fonseca (MARN) to Hector Vaides (Exmingua) dated 1 Oct. 2015 (C-0852).
[451] Exmingua's List of Findings of the MARN & MEM Inspections dated 12 Oct. 2015 (C-0699).
[452] *Id.*
[453] MEM Report on Inspection of 26 Nov. 2015 (C-0628); MARN Report on Inspection of 26 Nov. 2015 (C-0629).
[454] *See* Resp's C-M ¶¶ 768-769.

works aimed at mitigation of environmental impacts."[455] The report reflects that the MARN inspected all aspects of the site, including the mining pits and exploration areas, the tailings ponds, the sedimentation pits and rubble area, the processing site, and the laboratory, noting that several improvements had been made following its February 2015 inspection.[456]

143. As the MARN observed, for example, "[i]n the environmental monitoring carried out in February 2015 . . . the requirement was made to raise the boundary to avoid the infiltration of tails into the perimeter soil. At present, it was observed that this requirement was made and no infiltration was observed in this pile in the perimeter floor."[457] The MARN further observed that the "perimeter mesh" around the tailings pond—noted as missing in the MARN's earlier inspection—had been installed.[458] In addition, the MARN observed that "a sedimentation pit is available" "for runoff water," which also had been missing in the earlier inspection.[459] The MARN concluded its inspection report with just six actions for Exmingua to take to improve its environmental compliance.[460]

144. The MEM's report of the November 2015 inspection similarly reflected that Exmingua had taken steps in line with recommendations from the February 2015 inspections. In particular, the MEM observed that, in the mining pits, "the slopes are properly conformed . . . [demonstrating] adequate management of high-fracturing areas due to local and regional faults that prevail in the area has been carried out."[461] The MEM further observed that "[t]he management of sediments . . . was evidenced."[462] The MEM also noted, approvingly, that "[n]o scattered waste material was identified in the areas of exploitation, so they are properly deposited in the areas enabled as rubbish," a "dining area has been implemented," "the implementation of information, preventive and prohibited signaling was verified," and that personnel "were using the appropriate personal protective equipment for their work in this area: Helmet, vest or shirt with reflective strips, lenses, lumbar belt, steel-tipped boots,

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[455] MARN Report on Inspection of 26 Nov. 2015, at 3 (C-0629).

[456] *Id.* at 8.

[457] *Id.* at 8.

[458] MARN Report on Inspection of 26 Nov. 2015, at 8 (C-0629); MARN Technical Report dated 23-27 Feb. 2015, at 22 (R-0105).

[459] MARN Report on Inspection of 26 Nov. 2015, at 9 (C-0629); MARN Technical Report dated 23-27 Feb. 2015, at 48 (R-0105).

[460] MARN Report on Inspection of 26 Nov. 2015, at 21 (C-0629), recommending Exmingua to (i) construct bypass or runoff channels in the Poza del Coyote area; (ii) increase the curb or decrease the number of tails in the Central Stack and South Stack (iii) revegetate the rubble Area 16 for soil stabilization and erosion mitigation; (iv) order and organize the wastes in the solid waste storage area; (v) strengthen and implement stronger mining and industrial safety measures for the employees; (vi) prevent leaks in the fuel tank.

[461] MEM Report on Inspection of 26 Nov. 2015, at 4 (C-0628).

[462] *Id.* at 10.

mask and ear protectors."[463] The MEM summarized its findings in a series of conclusions at the end of the report, which contained only four recommendations for improvement.[464]

145. The day after the MEM's and the MARN's November inspection, Exmingua's chief engineer sent an email to Mr. Kappes noting that, "yesterday [the] MEM & MARN personnel arrived for an official inspection."[465] Consistent with the findings in the inspection reports, Exmingua's chief engineer reported that, "at the end of the inspection," the MEM and the MARN concluded that the "Tajos [*i.e.*, pits] are [in] acceptable condition," the "Lab is [in] acceptable condition," and that Exmingua needed to make sure the "ponds . . . [do not] fill up to the limits" and to "organize" the bodega area.[466]

146. By the end of 2015, Exmingua thus had addressed nearly all the issues noted by the MARN and the MEM in their earlier inspections, which Guatemala conveniently omits from its misleading narrative. Moreover, in 2016, Exmingua prepared a report listing each issue from the MEM's inspections and documenting, with photos and explanations, that each issue had been addressed.[467]

147. *Third*, Guatemala's assertion that the MARN "commenced administrative proceedings against Exmingua" arising from non-compliance with its environmental obligations is incorrect.[468] The purported "notification" to which Guatemala refers provides no indication that it was ever provided to Exmingua.[469] In addition, there was no follow-up from the MARN concerning the purported notice; in particular, although the document mentions a "hearing,"[470] nothing of the sort was ever held and, moreover, Exmingua was never fined by the MARN for its purported non-compliance. Given the timing of this document—just *one week* before the Supreme Court ordered the MEM to report the steps taken to comply with the *amparo provisional* and just *two weeks* before the MEM issued Resolution No. 1202 suspending Exmingua's exploitation license—it is apparent that the MARN merely sought to paper its regulatory oversight of Exmingua. Notably, the inspection report attached to this notice appears to be nothing more than the MARN's February 2015 report, with an additional

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[463] MEM Report from 26 Nov. 2015 Inspection (C-0628).

[464] *Id.* at 26, recommending Exmingua to (i) implement a system for the management of sediments from the exploitation fronts; (ii) continue the implementation of informative, preventive and prohibitive signaling in the area of the mine; (iii) implement appropriate control measures for the water level in the tailings collection pools; and (iv) continue reformation and revegetation work.

[465] Email from H. Vaides to D. Kappes dated 27 Nov. 2015 (C-0846).

[466] *Id.*

[467] Draft list of issues dated 29 Apr. 2016 (C-0847); Draft list of issues dated 25 May 2016 (C-0848).

[468] Resp's C-M ¶ 769.

[469] MARN Document No. 475-2016/DCL/EOGP/mirf dated 24 Feb. 2016 (R-0187).

[470] *Id.*

November 2015 inspection date affixed to the upper-right hand corner of each page, without any updates to the aspects inspected and confirmed to have been addressed in November.[471]

3. Exmingua Provided Generous Support To The Community

148. As explained in the Memorial, Exmingua continued to engage with the local community after obtaining its exploitation license for Progreso VII and, to that end, hired *Servicios Mineros de Centro de America* ("SMCA") and *Centro para el Desarrollo Rural* ("CEDER") to manage its social development programs.[472] In addition, Claimants explained that – notwithstanding the local communities' support and the approval of the EIA without any objection – protests against the mine began shortly after construction started in January 2012.[473] As Claimants observed, the protesters were not representative of the local community, which continued to express its support for the Project, denounced the blockade, and also requested that the Government take action "to resolve the conflict generated by a few neighbors supported by people and organizations foreign to the region."[474]

149. Claimants further explained in their Memorial that, after the blockade was lifted in May 2014, Exmingua continued to provide significant benefits to the neighboring communities and the region in general.[475] In particular, Exmingua continued to invest in social projects to benefit the community, including projects focused on health, education, and infrastructure.[476] Moreover, the vast majority of Exmingua's employees were residents of San José del Golfo and San Pedro Ayampuc, making Exmingua one of the largest employers in these communities.[477]

150. In its Counter-Memorial, Guatemala asserts that Exmingua did not have a comprehensive plan for stakeholder engagement.[478] Guatemala further asserts that Exmingua's social outreach activities were not part of a plan developed with the communities' needs in mind, that Exmingua's social support programs lack "specifics" and "metric[s] . . . to understand the impact," and that the

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[471] *See* MARN Notification No. 475-2016/DCL/EOGP/mirf dated 24 Feb. 2016, attaching 23-27 Feb. 2015 and 26 Nov. 2015 report (C-0849); MARN Technical Report dated 23-27 Feb. 2015 (R-0105). Items 24 and 69 concerning perimeter mesh and sedimentation pits, for example, have not been updated to reflect that these have been installed, as the MARN noted in November 2015.

[472] Clms' Mem. ¶¶ 40, 50.

[473] *Id.* ¶¶ 41-42, 47.

[474] *Id.* ¶ 47.

[475] *Id.* ¶ 67.

[476] *Id.* ¶ 68.

[477] *Id.* ¶ 67.

[478] Resp's C-M ¶¶ 688-698; 715-719.

programs were not provided to communities mentioned in the EIA.[479] In addition, Guatemala asserts that Exmingua failed to acquire and maintain a "social license."[480] These assertions are incorrect.

151. *First*, Guatemala's contention that Exmingua did not have a comprehensive plan for stakeholder engagement is wrong.[481] As the EIA indicates, "the development of the communities within the area of influence of the project" was a priority, and Exmingua thus planned to "work in coordination with the municipal authorities and development councils to define support programs for these communities."[482] Towards this end, by August 2011 – one month before the MEM issued the Progreso VII exploitation license – Exmingua developed a strategic plan to inform the surrounding communities about the Project and understand their concerns and needs ("Strategic Plan").[483]

152. As set forth in the Strategic Plan, Exmingua sought to, *inter alia*, "[e]stablish relationships of trust, credibility and respect with the area and between the different actors"; "[r]each consensus and good relations between all interest groups, based on a framework of respect and transparent and intercultural dialogue"; "[c]larify the myths and lies about mining [that] environmental groups have led [] the inhabitants to believe"; and "[p]rioritize according to the needs of the population the program of sustainable development work when the project is operating."[484] To achieve these objectives, Exmingua planned to "identify and strengthen" relationships with "leaders," "groups," and "with the population," as well as establish "support plans" following "analysis and prioritization of support [] works for development."[485] As noted in the Strategic Plan, this required meeting with "leaders who have expressed themselves for and against mining, as well as other neutral [leaders] recognized by the population" in order to "create channels of communication with leaders, as well as . . . find[] a suitable language for exchanging ideas."[486] The Strategic Plan then lists a number of operational steps to be used in the execution of the Plan across three phases, as well as a flowchart detailing the "[Chronology] of Activities for the Development of the Social Program."[487]

153. *Second*, Guatemala's assertions that Exmingua's social outreach activities were not part of a plan developed with the communities' needs in mind, were not provided to communities mentioned in

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[479] *Id.* ¶¶ 699-702.
[480] *Id.* ¶¶ 53, 666-669.
[481] *Id.* ¶¶ 692; 702; 719.
[482] Progreso VII EIA, at 295 (C-0082).
[483] SMCA's Strategic Plan for the Progreso VII Project dated Aug. 2011 (C-0701).
[484] *Id.* at 10-11.
[485] *Id.* at 14.
[486] *Id.* at 15.
[487] *Id.* at 16-18.

the EIA, and lack "metric[s] . . . to understand [their] impact" also are incorrect.[488] To the contrary, Exmingua – consistent with its Strategic Plan – implemented substantial social development programs in line with the needs of the communities of San José de Golfo, San Pedro Ayampuc, La Choleña, Los Achiotes, and El Guapinol, and kept detailed records of this social support.

154. As Ms. Telma García – who has served as a COCODE representative in the community since 2010 – explains, "people in the community feel abandoned by the government" which "provides almost no services to the community."[489] She elaborates that, "[t]here are no hospitals [in the community] and people struggle to access basic medical care," there are "few schools for our children," "[t]he roads are extremely poor," and "the community's infrastructure is in ruins."[490] Exmingua's social programs accordingly included an Information Program, a Community Health Program, and an Education Program, as well as other infrastructure and social outreach initiatives.[491] Exmingua's community support began shortly after Exmingua received its exploitation license.[492]

155. In 2012, as part of the Information Program, Exmingua continued to meet with community leaders, distributed flyers to community members in the Project's area of influence, and provided information on employment opportunities.[493] In addition, Exmingua held over 100 so-called "Hot Dog Parties" – informal social gatherings in the homes of local residents – designed to allow members of the community opportunities to learn more about the planned mine.[494] These events were held in the villages of La Choleña, Los Achiotes, El Guapinol, and San Antonio el Ángel (part of the municipality of San José del Golfo).[495] As evidenced by the number of meals distributed, over 7,000 people attended these gatherings.[496] On a single Saturday in October 2012, for example, Exmingua organized five gatherings in these communities that were attended by 431 people – an average of

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[488] Resp's C-M ¶ 701.

[489] Garcia ¶ 6.

[490] *Id.*

[491] SMCA's Plan for Development of Social Programs dated 2012 (C-0707).

[492] Resolution No. 03394 of the Ministry of Energy and Mines dated 30 Sept. 2011 (C-0090); SMCA's Executive Report on Activities up to 14 Oct. 2015 and Activities to Implement between 15 Nov. 2015 to 15 Dec. 2011 (C-0703).

[493] SMCA's Plan for Development of Social Programs dated 2012, at 4-6 (C-0707).

[494] Executive Report on Corporate Social Responsibility dated 2012 (C-0704).

[495] Executive Report on Corporate Social Responsibility dated 2012 (C-0704); Hot dog parties' schedule dated Oct. 2012 (C-0855); SMCA's Preliminary Report No. 005-INFO-cm-PO on Hot Dog Parties conducted on 6 Oct. 2012 (C-0756); SMCA's Preliminary Report No. 009-INFO-cm-PO on Hot Dog Parties conducted on 8 Oct. 2012 (C-0757); SMCA's Preliminary Report No. 010-INFO-cm-PO on Hot Dog Parties conducted on 9 Oct. 2012 (C-0712).

[496] Executive Report on Corporate Social Responsibility dated 2012 (C-0704).

more than 80 people per gathering.[497] Exmingua also set up a stall at the San José del Golfo fair to explain the minerals and chemical agents involved in the mining process.[498]

156. As part of its Community Health Program, Exmingua organized events to inform the communities about medical benefits available to them with Exmingua's support.[499] Notably, during 2012, Exmingua's support provided treatment for 1,101 patients at a health clinic in San José del Golfo established by SMCA, many of whom visited the clinic "2, 3, and more times."[500] These patients were treated for "renal problems, arterial hypertension, diabetes [and] arthritis," among other issues.[501] Pediatric patients also received treatment for "respiratory tract problems [caused by viruses and bacteria], intestinal diseases such as acute diarrheal syndrome, parasitism and malnutrition."[502] In addition, Exmingua paid for the treatment of 920 patients at a dental clinic located in La Choleña.[503]

157. Also during 2012, Exmingua's Community Health Program provided support for six surgical interventions at the Maranatha Hospital in Guatemala City – including a hernioplasty, cholecystectomy, and an appendectomy – in addition to 74 ultrasounds and 62 screenings for cervical cancer, as well as the transport costs to and from the hospital.[504] In addition, Exmingua sponsored a Medical Day – held on 10 May (in celebration of Mother's Day) – which included services from specialists in internal medicine, pediatrics, gynecology, and general medicine, in which 120 community members received treatment.[505] Two days later, an Ophthalmology Day was held, in which another 110 community members received treatment.[506] With Exmingua's support, members of the community also received medications, including intravenous medication and intramuscular injections, and home health care visits from doctors, when they were unable to visit the clinic.[507]

158. Exmingua's Education Program was also extensive. To launch the Program, Exmingua held a meeting on 5 January 2012 at the Municipal Hall in San José del Golfo to inform communities within

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[497] SMCA's Preliminary Report No. 005-INFO-cm-PO on Hot Dog Parties conducted on 6 Oct. 2012 (C-0756).
[498] SMCA's Plan for Development of Social Programs dated 2012, at 5 (C-0707).
[499] *Id.* at 2.
[500] *Id.*
[501] *Id.*
[502] *Id.*
[503] SMCA's Plan for Development of Social Programs dated 2012, at 2 (C-0707).
[504] *Id.*; Executive Report on Corporate Social Responsibility dated 2012 (C-0704).
[505] SMCA's Plan for Development of Social Programs dated 2012, at 2 (C-0707).
[506] *Id.*
[507] *Id.* at 3.

the Project's area of influence about Exmingua's support for youth education.[508] The meeting was attended by over 500 people from the communities of San José del Golfo, La Choleña, Los Achiotes, and El Guapinol, including village leaders.[509] During 2012, Exmingua provided support to 241 primary, elementary, and high school students, as well as seven university students, from these communities.[510] Exmingua hired tutors who provided support to these students in various subjects.[511] Exmingua also donated several computers to local schools.[512]

159. In addition, Exmingua moved quickly to provide critical infrastructure repairs and other social support. For example, in 2012, Exmingua repaired a bridge in San Antonio el Ángel damaged by flooding, repaired a road between El Guapinol and San José del Golfo, and constructed a 50-meter retaining wall near San José del Golfo.[513] Exmingua also built a soccer field in the village of San Antonio El Ángel, contributed financial support to the San Antonio El Ángel community fair, and provided funerary support to members of the community.[514] By the end of 2012, within the first year of obtaining its Progreso VII exploitation license and before it even had begun operations and, thus, before it had earned any revenue from the Project, Exmingua's expenditures in support of the community totaled US$ 380,000.[515] In 2013, Exmingua hired another consultant – *Centro para el Desarrollo Rural* ("CEDER") – to conduct workshops, which were designed to further inform the community about the mine and to address any concerns, and included programing in the Kakchiquel (Mayan) language.[516]

160. Exmingua's community outreach and support intensified after the blockade was lifted in 2014 and throughout 2015, only ceasing in 2016 when Exmingua was forced to suspend operations.[517] This outreach included bi-weekly meetings with community leaders and representatives to "ascertain their

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[508] Email from S. Morales to D. Kappes dated 6 Jan. 2012, attaching educational program plan (C-0706).

[509] *Id.*; *see also* SMCA's Report No. 023-INFO-cm-PO-2012 on Educational Programs dated 8 Nov. 2012 (C-0733).

[510] SMCA's Plan for Development of Social Programs dated 2012, at 2 (C-0707); Executive Report on Corporate Social Responsibility dated 2012 (C-0704).

[511] SMCA's Plan for Development of Social Programs dated 2012, at 4 (C-0707).

[512] *Id.*

[513] *Id.* at 5.

[514] *Id.*

[515] KCA report "Progreso VII – Resume of Work Performed during 2012" dated 27 Jan. 2013 (C-0521).

[516] CEDER, Conflict Mediation and Community Relations Plan Tambor (Progreso VII) Project dated 29 Jan. 2013 (C-0854); CEDER, Proposal: Educate and Raise the Level of Understanding of the Mine and Respond to the Valid Anti-Mining Concerns dated 1 Sept. 2013 (C-0826); CEDER's weekly report No. 01/2013 for the period between 1 to 11 Oct. 2013 (C-0853).

[517] Exmingua Consolidated Report on Social Responsibility (July-December 2014) (C-0527); Exmingua's report on Corporate Social Responsibility in July – December 2014 dated Jan. 2015 (C-0708); Exmingua's report on its social activities in Jan.-Dec. 2015 (C-0714); Exmingua's report on its social activities dated 8 Jan. 2015 (C-0715).

main needs."[518] The outreach further comprised "social awareness talks" so that "the parties involved would get to know each other," which "led to more spontaneous invitations from the residents and an agreement to begin the process for [] donation[s] . . . as per the community's requests."[519] Topics of discussion at these meetings included "planning of projects," as well as "clean mining."[520] Based upon these meetings, it was determined that "[t]he main Social needs where [] Exmingua can become involved" concern "roads," "basic housing," "drains, piping, [and] earthworks," and "water [issues]," as well as "continu[ed] education" and "health support."[521] Exmingua thus resolved "[t]o support the participating communities in their basic needs as determined at the community meetings."[522]

161. Consistent with the communities' requests, Exmingua's infrastructure support during this period included, *inter alia*, road ballasting and drainage works, building platforms to lift homes out of flooded areas, filling flooded areas to create dry lots for homes, and filling a dangerous ravine.[523] Exmingua also provided large numbers of roofing panels to the communities, including 1,640 panels to 220 families in 2015.[524] As Ms. García – who "[a]s a COCODE representative [] was responsible for the coordination and distribution of [] benefits to [her] village" – observes, Exmingua "undertook infrastructure projects that improved the condition of [] roads," and also provided assistance "in installing drainage pipelines, [] regrading soil and building platforms so that families could move their homes out of flooded areas."[525] As Ms. García further explains, "it is common for members of the community to have leaks in their roofs that allow water to flood their homes," so "Exmingua's support allowed members of the community to fix this problem."[526]

162. In addition, Exmingua continued to provide medical support.[527] In this regard, Ms. García explains that "[t]hrough [Exmingua's] healthcare services, community members were able to receive surgeries and medicines that would not otherwise have been available to them," as well as other "essential healthcare services."[528] Ms. García further notes that "the healthcare services were free,

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[518] Exmingua Consolidated Report on Social Responsibility (July-December 2014), at 3, 5 (C-0527).

[519] *Id.* at 5, 33.

[520] *Id.*

[521] *Id.* at 3-4.

[522] *Id.* at 4.

[523] *Id.* at 6-14, 29; García ¶ 25.

[524] Exmingua Consolidated Report on Social Responsibility (July-December 2014), at 16-29 (C-0527); Exmingua report on deliveries dated 2015 (C-0526); Exmingua report on field work activities dated 2015 (C-0524); García ¶ 25.

[525] García ¶ 26, 30.

[526] *Id.* ¶ 26.

[527] Exmingua Consolidated Report on Social Responsibility (July-December 2014), at 15 (C-0527); Exmingua report on field work activities dated 2015 (C-0524).

[528] García ¶ 27.

and medication was provided without charge."[529] As Ms. García explains, "such benefits were common," and "the company never failed to provide assistance when requested."[530]

163. Moreover, Exmingua employed hundreds of members of the community,[531] which significantly improved the lives of these workers and the area's economy. As Mr. Carraza – a local business owner and COCODE representative – observes, "[m]any people [in the community] are poor and there are very few jobs."[532] However, when a member of the community was hired by Exmingua, "it had a significant positive impact on their lives, as it provided them with reliable income and hope for the future."[533] Members of the community were "very happy and proud to work" at the mine.[534]

164. In this regard, Mr. Gálvez – a former Exmingua employee – explains that he and his family "greatly benefitted from the higher salary that [he] received for [his] work, as compared to [his] former construction work," as the "salary [he] received at Exmingua was three times greater."[535] In addition, Exmingua trained Mr. Gálvez to work in a mineral laboratory, allowing him to transition from "strenuous manual labor" that was "not steady."[536] Mr. Gálvez further explains that "Exmingua had a significant and positive impact on the economy of San José del Golfo," and that "[d]uring Exmingua's operations," "shopkeepers regularly commented to [him] that many of Exmingua's employees would visit their shops and spend money."[537] Exmingua and its social development programs thus "contributed to a feeling of hope and optimism within the community."[538] Notably, since the mine's closure, the majority of the mineworkers are believed to be still unemployed;[539] the shutdown thus has resulted in diminished employment opportunities in the local communities.[540]

165. *Third*, Guatemala's assertion that Exmingua failed to acquire and maintain a "social license" is unfounded. In particular, Guatemala contends that it was necessary for Exmingua to obtain and maintain the constant support of the community for the Project, and that Exmingua failed to do this, as demonstrated by the allegedly peaceful, grassroots protests, and because Exmingua purportedly

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[529] *Id.*
[530] *Id.* ¶ 30.
[531] List of Exmingua Employees in 2011-2017 (C-0842).
[532] Carraza ¶ 6.
[533] *Id.* ¶ 14.
[534] García ¶ 31.
[535] *Id.* ¶¶ 6-10.
[536] *Id.*
[537] *Id.* ¶ 12.
[538] *Id.* ¶ 31.
[539] Carraza ¶ 14.
[540] Gálvez ¶¶ 11-12; Carraza ¶ 14; Garcia ¶ 31.

engaged in quasi-military tactics to harass and intimidate the community and purportedly attempted to bribe protesters. None of this is correct.

166. As an initial matter, the concept of a "social license to operate" ("SLO") is vague and aspirational,[541] and Respondent fails to explain what is meant by the term; what, if any, legal obligations derive from the term; and how Exmingua failed in this regard.

167. Guatemala's principal support for the concept of a "social license to operate" comes from the International Council of Mining and Metals ("ICMM"), which refers to the same as a "best practice."[542] While Guatemala contends in the *first paragraph* of its Counter-Memorial that the ICMM is a "legal body," it plainly is not (it is an organization of 27 companies).[543] The concept of a "social license" thus cannot be relied upon in these proceedings as a legal obligation. To the contrary, mining companies refer to the Social License Obligation ("SLO") as an element of their Corporate Social Responsibility ("CSR") strategy.[544] Moreover, an SLO differs on some key points with Free, Prior and Informed Consent.[545] In addition, "[t]he SLO is subject to various critiques, which relate mainly to the ambiguity that surrounds the concept."[546] Indeed, Guatemala itself describes the concept of a social license as "an unwritten social contract."[547]

168. In any event, although Exmingua had the legal right to operate,[548] it nonetheless actively sought and secured the continuing support for its operations from the surrounding communities. As Ms. García observes, before the mine began operating, Exmingua organized meetings between Exmingua representatives and COCODE representatives.[549] At these meetings, the Exmingua representatives explained the purpose of the mine, how the mine would operate, and the benefits that

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[541] Mendoza ¶¶ 56-61.

[542] Resp's C-M ¶¶ 153, 672; ICMM, Indigenous Peoples and Mining Good Practice Guide dated 2015 (RL-0295).

[543] Resp's C-M ¶ 1.

[544] *See* N. Hall, J. Lacey, S. Carr-Cornish & A-M Dowd, *Social Licence to Operate: understanding how a concept has been translated into practice in energy industries*, 86 J. OF CLEANER PRODUCTION 307 (2015) (C-0858); *see also* M. E. Meesters & J. H. Behagel, *The Social Licence to Operate: Ambiguities and the neutralization of harm in Mongolia*, 53 RES. POL. 274 (2017) (C-0822).

[545] J. Prno & D. S. Slocombe, *Exploring the origins of 'social license to operate' in the mining sector*, 37 RES. POL. 346 (2012) (C-0859); *see also* M. E. Meesters & J. H. Behagel, *The Social Licence to Operate: Ambiguities and the neutralization of harm in Mongolia*, 53 RES. POL. 274 (2017) (C-0822).

[546] M. E. Meesters & J. H. Behagel, *The Social Licence to Operate: Ambiguities and the neutralization of harm in Mongolia*, 53 RES. POL. 274, 275 (2017) (C-0822); *see also* J. R. Owen & D. Kemp, *Social licence and mining: a critical perspective*, 38 RES. POL. 29, 33 (2012) (C-0860).

[547] Resp's C-M ¶ 670; *see also* Pérez ¶¶ 19-20 (observing that actions taken "with the aim of obtaining a 'social license to operate' . . . . can in no way be considered legally binding commitments to the government . . . .").

[548] Clms' Mem. ¶ 40; Resolution No. 03394 of the MEM dated 30 Sept. 2011 (C-0090).

[549] García ¶ 16; Carraza ¶ 8.

the mine would provide to the community, and the COCODE representatives asked questions concerning the mine's economic and environmental impacts.[550] As Ms. García further observes, "as a result of these meetings, all of the COCODE representatives agreed that the mine should be built" and "approximately 80 to 90 percent of the community supported the project."[551]

169. In addition, after the protests blocked access to the mine, Exmingua organized a large meeting in the Municipal Hall of San Pedro Ayampuc, which was attended by around 7,000 members of the community.[552] At this meeting, three Exmingua representatives spoke explaining the benefits of the mine, answering questions, and soliciting views from the community about the Project.[553] As Ms. García observes, "[t]he majority of the community members attending the meeting supported the mine and agreed that the project should move forward."[554]

170. Further, while the mine was operating, Exmingua continued having meetings with the community to provide information about the mine and address any concerns.[555] These meetings occurred in "villages, hamlets, and settlements,"[556] and at these meetings, "people would ask all sorts of questions, for example, about how the mine works or about its impact on the environment, and Exmingua's representatives would answer."[557] As Mr. Carraza, who attended several of these meetings, explains, "the vast majority of the community supported Exmingua, and its presence in the community."[558] Exmingua also held tours of the mine for members of the community interested in seeing it for themselves.[559] As a result of these and other actions,[560] Ms. Mendoza – an expert on the implementation of social management programs in Guatemala – observes that "Exmingua actively engaged with the communities to gain acceptance for its Project by the majority of the community."[561]

171. Moreover, contrary to Guatemala's assertions,[562] the protests were not part a peaceful, grassroots movement and do not indicate that Exmingua failed to secure local community support.

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[550] García ¶¶ 16-17.
[551] *Id.* ¶ 18.
[552] *Id.* ¶ 20.
[553] *Id.* ¶ 21.
[554] *Id.* ¶ 23.
[555] Carraza ¶ 9; García ¶ 24.
[556] García ¶ 24.
[557] Carraza ¶ 9.
[558] *Id.* ¶¶ 9, 15.
[559] Carraza ¶ 10; García ¶ 25; Exmingua report on field work activities dated 2015, at 2 (C-0524).
[560] *See* Mendoza ¶¶ 62-71.
[561] Mendoza ¶ 71.
[562] Resp's C-M ¶¶ 53-54.

Notably, as Ms. Mendoza observes, from the beginning of Exmingua's community consultations during the EIA process until early 2012, "no conflict was exhibited by the communities in the Project's area of influence."[563] Rather, it was with the arrival of "*entities external to the Project's area of influence*, with vested ideological and political agendas" "*oppos[ed] to mining projects*" that "first manifest[ed] opposition to the Project [] in March 2012, nearly six months after Exmingua's exploitation license was granted and two months after construction began."[564] As Ms. García and Mr. Carraza further explain, the protesters were "not representative of the community," were "manipulated by organizations outside of the community," were "often bussed in from other areas," and "were "paid [] 75 quetzals per day to protest . . . ."[565] "[M]any of the people who protested against the mine did it out of necessity and to earn money."[566]

172. In fact, "the first manifestation of opposition" was "led by Congressman Carlos Mejía of the Guatemalan National Revolutionary Unity Party (URNG)," a guerilla militia-turned political organization responsible for myriad atrocities during Guatemala's 36-year civil war.[567] In the 2011 elections, held on 11 November 2011, the URNG did not put forward a presidential candidate or any national congressional candidates, and won just 0.87% of the vote (15th place) in the district congressional elections (winning only one seat out of 127).[568] In early 2012, Carlos Mejía – newly elected as the sole representative of his party, and a former guerilla himself[569] – targeted Exmingua, a small, foreign-owned mining operation, recently approved and under construction, for political gain.

173. Notably, Congressman Mejía's district of San Marcos is *273 kilometers away* from the Project; as Ms. Mendoza observes, it thus is "reasonable to conclude that his opposition was motivated by his own political and ideological agenda, rather than by social or community interests."[570] Nonetheless, Exmingua invited Congressman Mejía to tour the mine, which he did, and he subsequently informed the protesters that "everything was being carried out according to the law" and that "because of this he was *conclud[ing] his role*."[571]

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[563] Mendoza ¶ 42.

[564] *Id.* ¶¶ 12, 43, 46-47 (emphasis added).

[565] Carraza ¶ 15; García ¶ 19.

[566] García ¶ 19.

[567] Mendoza ¶ 43.

[568] 2011 Guatemalan General Election results, *Wikipedia* (C-0861).

[569] Aila M. Matanock, "Explaining the Spread of Electoral Participation Provisions in Civil Conflict Settlements," dated 2018, at 18 (C-0862); Mendoza ¶¶ 43-45.

[570] Mendoza ¶ 44.

[571] Email from S.Morales to D.Croas, D Kappes, *et al* dated 14 Mar. 2012 (C-0101); Clms' Mem. ¶ 45.

174. Following Congressman Mejía's pronouncement, small groups of protesters continued to block access to the site.[572] These protests were organized by the National Front of Struggle ("FNL"), a self-described revolutionary group whose agenda includes opposing extractive projects that it describes as "plundering [Guatemala's] natural resources;" the Center for Legal, Environmental and Social Action ("CALAS"), a now-defunct activist organization that later took the lead in filing legal actions to shut down Exmingua's operations and was denounced by the Public Ministry in 2018 following a corruption and financial scandal;[573] Madre Selva, a group working against "dispossession through mining,"[574] which received international financing for its protest activities[575]; and MiningWatch Canada, which seeks to "prevent the establishment of mining projects."[576]

175. As Ms. Mendoza explains, because the protests were motivated by "a specific political and ideological agenda that seeks to block any mining investment project in the country that involves the use or extraction of natural resources," the "small group displayed a violent and ideological attitude oriented towards conflict."[577] As Ms. Mendoza further observes, the "protesters refused to participate in dialogue, and resorted to violence against project workers."[578] In such circumstances, as Ms. Mendoza confirms, "any conflict-resolution effort is useless, as the objective of these groups opposed to the mine is not to resolve a conflict," but "part of their discourse and work plan" to "promote their own political and ideological agenda."[579]

176. The extent of Guatemala's mischaracterization of the so-called "Peaceful Resistance of La Puya" is made patently clear by examining the case of Yolanda Oquelí, a leader of the protesters who Guatemala features as a central figure.[580] While Guatemala portrays Ms. Oquelí as a pacifist victim,[581] Ms. Oquelí actually was an aggressive member of the opposition, who engaged in armed attacks against Exmingua employees.

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[572] Mendoza ¶¶ 45-46.

[573] *Id.* ¶ 46; Press Release, "The corruption case in CALAS, an environmental NGO," *Nomada*, 14 Aug. 2018 (C-0745).

[574] Madre Selva, *About us* (C-0743).

[575] Republica, "Who has financed the actions against the hydroelectric plants?," dated 2 Mar. 2017 (C-0753).

[576] Press Release, "About us," *MiningWatch Canada,* undated (C-0752); Mendoza ¶ 54.

[577] Mendoza ¶¶ 47, 49; *see also* Photo of "Peaceful" Resistance dated 23 May 2014 (C-0873); Photo of "Peaceful" Resistance dated 24 May 2014 (C-0919); Photo of "Peaceful" Resistance dated 24 May 2014 (C-0920); Photo of "Peaceful" Resistance, undated (C-0921); Photo of Police Officer dated 23 May 2014 (C-0922).

[578] Mendoza ¶ 47.

[579] *Id.* ¶ 55.

[580] Resp's C-M ¶¶ 40, 683.

[581] *See id.* ¶¶ 40, 683-684.

177. As a former Exmingua employee, Mr. Gálvez, recalls, "Yolanda Oqueli Veliz [w]as a leader of the protesters" and "[s]he regularly would verbally abuse Exmingua's workers when we tried to enter or leave the mine, calling us … foul names."[582] On 3 May 2012, Ms. Oquelí and a few other protesters approached Mr. Gálvez and his colleagues "carrying guns and machetes, and wearing ski-masks," "shout[ing] at [them] and threaten[ing] to kill [them]."[583] Mr. Gálvez and his colleagues "ran, but the protesters caught [them], and detained [them]," after which they were "pushed to the ground, physically assaulted, and guns were pointed at [their] heads."[584] As Mr. Gálvez further explains, "[t]he protesters yelled that we deserved this because we worked at the mine and told us that, if we did not stop working there, they would kill us."[585] Although Mr. Gálvez tried to reach for his phone, the protesters screamed that, if he touched his phone, they would "tie [him] up and burn [him] alive."[586] One of the attackers then severely cut the hand of one of Exmingua's workers with a machete, after which the the protesters finally relented and released the workers.[587]

178. Following the attack, several of the attackers were charged with and convicted of crimes.[588] Although Ms. Oquelí initially failed to appear in court, she too was later charged with several crimes arising out of this attack.[589] Ms. Oquelí was acquitted on the basis that "as a woman, [Ms. Oqueli] would not be able to carry a machete."[590] That Ms. Oquelí simultaneously "speaks passionately about [her] deep commitment to nonviolent resistance" and holds herself out as a "symbol" of "the peaceful nature of [the] struggle"[591] reveals the duplicity of the persons organizing the opposition to Exmingua.

179. Guatemala adopts a similar tack in its efforts to characterize Exmingua as a quasi-military organization,[592] but these efforts similarly fall flat. Although Guatemala attempts to impliedly link Exmingua to Ms. Oqueli's shooting,[593] the investigation into her attack revealed that Ms. Oquelí made

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[582] Gálvez ¶ 14.

[583] *Id.* ¶ 15.

[584] *Id.* ¶ 15 (emphasis added).

[585] *Id.* ¶ 16.

[586] *Id.* (emphasis added).

[587] *Id.* ¶ 16.

[588] Gálvez ¶ 17; Judgment of Eighth Criminal Court No C-01079-2012-00214 dated 30 Apr. 2014 (C-0863).

[589] Report of the National Civil Police of Guatemala (PNC), Official Letter No. 164-2016/REF/JJGD/dl dated 10 May 2016 (R-0117).

[590] News Release, "Guatemala: Human rights defender Telma Yolanda Oquelí goes free because 'woman cannot carry machete'," *Human Rights Defenders*, 8 July 2014 (C-0865).

[591] Kelsey Alford-Jones, "A Roadblock Becomes a Gateway to Resistance in Guatemala," *Uprising*, 28 Jan. 2013 (R-0207).

[592] Resp's C-M ¶¶ 55, 696.

[593] Resp's C-M ¶¶ 682-683; Kelsey Alford-Jones, "A Roadblock Becomes a Gateway to Resistance in Guatemala," Uprising, dated 28 Jan. 2013 (R-0207); News Release, "Guatemala: 'Blue Helmets' organized by companies for conflict, not peace," *GoldCorp Out News*, 12 Nov. 2012 (R-0041).

"no direct complaint . . . against [Exmingua]," and it thus was determined that any such allegation should be dismissed."[594] In addition, Guatemala asserts that "Exmingua sent ex-military personnel to threaten the protesters and [] to attack the women,"[595] but this is wholly unsupported by the underlying exhibit on which Guatemala relies, and nonetheless is categorically untrue. To the contrary, Exmingua's social development representatives were "trained to act within the national legal framework, insisting on non-violence . . . respecting the customs of the people of the place."[596]

180. Guatemala further wrongly asserts that "Exmingua flew over the area with helicopters in acts of intimidation."[597] However, as Mr. Kappes explains, the helicopters were used to fly equipment into the site, as "the blockade prevented equipment [] from entering the mine site."[598] In addition, Guatemala asserts that "Exmingua employed methods akin to an invading force, spreading propaganda through pro-mining leaflets dropped in the surrounding communities via helicopter,"[599] but this also is false. In fact, as was the case for a celebration to mark the successful end of the Education Program for 2012 and to register interest for the 2013 school year – and as photos of this canvassing reflect – "Exmingua employees [walked around] to the communities to distribute information flyers."[600] This was very effective, as 650 people from Los Achiotes, El Guapinol, San Antonio el Ángel, La Choleña, San José del Golfo, and El Carrizal attended the celebration.[601] Guatemala's misinformation is unsurprising, as it relies upon such publications as *Uprising* (a blog with the mission "to identify and clarify the struggles against corporate power"), *GOLDCORP OUT News* (a "blog maintained by the International Coalition Against Unjust Mining in Guatemala"), and other WordPress.com blogs, asserting their reporting as fact.[602]

181. Moreover, Guatemala's repeated assertion that some employees of SMCA were former members of the military – *i.e.*, "ex-military"[603] – to suggest that they were unsuited to social outreach

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[594] Letter from Ministerio Publico No. MP001-2012-89780 dated 2 Feb. 2015 (C-0866).

[595] Resp's C-M ¶ 55; Kelsey Alford-Jones, "A Roadblock Becomes a Gateway to Resistance in Guatemala," *Uprising*, 28 Jan. 2013 (R-0207).

[596] SMCA's Report on Notable Factual Developments dated 2012 (C-0864).

[597] Resp's C-M ¶¶ 57, 696.

[598] Kappes I ¶ 65.

[599] Resp's C-M ¶ 696.

[600] SMCA's Report No. 023-INFO-cm-PO-2012 on Educational Programs dated 8 Nov. 2012, at 3 (C-0733).

[601] *Id.*

[602] Kelsey Alford-Jones, "A Roadblock Becomes a Gateway to Resistance in Guatemala," *Uprising*, 28 Jan. 2013 (R-0207); Goldcorp out of Guatemala, at 7 (C-0867); News Release, "Guatemala: 'Blue Helmets' organized by companies for conflict, not peace," *GoldCorp Out News*, 12 Nov. 2012 (R-0041); Q. De León, Former Military Man Convicted: Worker of a Mining Company for Threatening Journalist (contains video) dated 17 Oct. 2013 (R-0043); News Release, "La Puya Resists against Attacks by Exmingua in San José del Golfo," *Convergencia,* 14 Nov. 2012 (R-0045).

[603] Resp's C-M ¶ 697.

is misplaced; for instance, Mr. Morales (the director of SMCA) was *both* a former member of the military and the former Director General of Mining at the Ministry of Energy and Mines.[604] In any event, despite Guatemala's insinuation, simply being "ex-military" does not make one unable to engage in community outreach.

182. Guatemala also attempts to impugn the credibly of Mr. Kappes directly, insisting that "[his] initial plan to get rid of the blockade involved [] bribing the protesters."[605] That is untrue. Guatemala, in fact, grossly mischaracterizes the exhibit it relies upon in support of this assertion, a short email from Mr. Kappes to Mr. Morales.[606] In that email, Mr. Kappes observes that it was the "the *demonstrators* [that] have a large monetary demand" and told Mr. Morales "[not to] agree to anything."[607] Mr. Kappes continued stating that "any money we give them [would] come[] out of our general social program fund . . . So, I think this would not go over very well with the *communities in the immediate area of the mine*, since their programs would be reduced accordingly."[608] Far from an "initial plan" to bribe the protesters, Mr. Kappes was in fact determined *not* to pay given in to the protesters demand for money, out concern to provide maximum support to *actual members of the community* in the Project's vicinity.

183. As thus is clear, and as Ms. Mendoza observes, "no conflict was exhibited by the communities in the project's area of influence" from the beginning of the EIA consultations until "nearly six months after Exmingua's exploitation license was granted and two months after construction began."[609] The later "opposition came from people who were not representative of the local communities"[610] that "resorted to violence against project workers"[611] as part of a "a specific political and ideological agenda that seeks to block any mining investment project in the country that involves the use or extraction of natural resources . . . . [and] that aims to change the country's development model,"[612] opposing "any agreement reached among States, communities, and foreign companies."[613]

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[604] Anuario Estadistico Minero dated 2008, at 2 (C-0868).
[605] Resp's C-M ¶ 721.
[606] Email from D. Kappes to S. Morales (SMCA) *et al*. dated 11 Mar. 2012 (C-0099).
[607] *Id.* (emphasis added).
[608] *Id.*
[609] Mendoza ¶¶ 42-43.
[610] *Id.* ¶ 43.
[611] *Id.* ¶ 47.
[612] *Id.* ¶¶ 47-49.
[613] *Id.* ¶ 49.

184. As Ms. Mendoza confirms, "[i]n the face of this type of systemic opposition and resistance, any conflict-resolution effort is useless, as the objective of the[] [opposition] is not to resolve a conflict," and that "exceeds the capabilities, responsibilities and good will of any investment company such as Exmingua."[614] Nonetheless, Exmingua "maintained an active effort to engage with the community even when it was unable to operate,"[615] and "[a] review of Exmingua's social management program . . . leads to the conclusion that the information [Exmingua] provided to the community, its consultations process, and the community engagement activities it conducted was significant and permitted the establishment of a relationship of trust with the authorities, local leaders, and surrounding communities."[616]

4. The Progreso VII Mine Demonstrated Great Potential And Exmingua Was Preparing To Expand Operations

185. In their Memorial, Claimants set out the manner in which they and Exmingua developed and operated the mine following a delay of more than two years caused by the 2012-2014 blockade, and described Exmingua's expansion plans at the time the mine shut down in May 2016.[617] Specifically, Claimants described that they designed, built and shipped to Guatemala a processing plant that was installed at Tambor,[618] and that Exmingua completed construction at the site (inclusive of waste dumps and four tailings ponds).[619] They also established that Exmingua commenced mining three open pits at Progreso VII from October 2014, in accordance with the sequence designed by Claimants and using the flotation process for plant recovery, while at the same time gathering mining data.[620]

186. Claimants then set out the results of Exmingua's mining, which at the two Guapinol South pits comported with their expectations based on data and testing, with the exploitation at Poza del Coyote proving even more successful than expected.[621] Claimants also described how they continually made improvements to Exmingua's mining approach and to the plant's functioning to improve recovery, and how they also planned to install a tailings plant to further increase recovery.[622] Finally, Claimants noted that Exmingua shipped first concentrate in December 2014 and continued to

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[614] Mendoza ¶ 55.
[615] *Id.* ¶ 63.
[616] *Id.* ¶ 62.
[617] Clms' Mem. ¶¶ 54-66; Kappes I ¶¶ 95-126.
[618] Clms' Mem. ¶ 55; Kappes ¶ 68.
[619] Clms' Mem. ¶¶ 55-59; Kappes I ¶¶ 100-101.
[620] Clms' Mem. ¶¶ 56, 60-64; Kappes I ¶¶ 102-105.
[621] Clms' Mem. ¶ 63; Kappes I ¶ 106.
[622] Clms' Mem. ¶¶ 63-64; Kappes I ¶¶ 105, 107, 111-112.

do so until the shut down, making 67 shipments in total and earning approximately US$ 12 million from the sale of gold during this period.[623]

187. In its Counter-Memorial, Guatemala for the most part does not challenge the development and operation of the mine in 2014-2016 as set out by Claimants—nor could it. Guatemala, however, argues that certain aspects of the operations performed less successfully than established by Claimants, or even unlawfully.[624] It claims, in particular, that Exmingua's processing capacity and the recovery rate are overstated.[625] These allegations are incorrect.

188. *First*, Guatemala criticizes Claimants for purportedly overstating Exmingua's processing capability or "feed capacity."[626] In doing so, Guatemala questions the veracity of the data provided by Claimants and reflected in the Daily Summary Data for October 2014–May 2016, stating that it "appears to have been created for the purposes of this case" and noting that this daily log includes days that "do not record how much raw material was processed and the shifts appear then disappear."[627] Guatemala also questions whether Claimants and Exmingua made any updates or modifications to Exmingua's flotation plant to improve its throughput rate.[628] Lastly, Guatemala asserts that Exmingua was only authorized to process 150 tons of gold per day, so was operating unlawfully when exceeding that amount and could not expect to continue to operate at that rate or increase that rate, as Claimants and SRK assume Exmingua would have done.[629] These assertions are wrong.

189. At the outset, contrary to Guatemala's unfounded allegations, the data included in the Daily Summary Data for October 2014–May 2016 is reliable.[630] The Summary is based on data for the plant's operations collected contemporaneously on a daily basis and was prepared shortly after the May 2016 shut down of Exmingua's operations by the plant manager, who compiled the throughput data contained in daily reports.[631]

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[623] Clms' Mem. ¶¶ 65-66; Kappes I ¶¶ 120; SRK I ¶¶ 27.

[624] Resp's C-M ¶¶ 790-796.

[625] *Id.* ¶¶ 790-796.

[626] *Id.* ¶¶ 790-793.

[627] *Id.* ¶ 790.

[628] *Id.* ¶ 792; *see also* PO No. 6 dated 15 Mar. 2021, Annex B, Request 38, at 59.

[629] Resp's C-M ¶ 793.

[630] Kappes II ¶ 69.

[631] Email from D. Kappes to R. Adams (Exmingua) dated 24 Mar. 2017 (C-0721) (explaining the methodology of preparing the summary and forwarding an email from J. Hernandez (Exmingua, plant manager) to D. Kappes dated 1 June 2016 (attaching the Daily Plant Summary Data for Oct. 2014 – May 2016); Kappes II ¶ 69.

190. Guatemala assertion that the mine was processing around 200 tons of raw material per day, and that it was not technically capable of processing more tonnage,[632] is also incorrect. Between June and December 2015, the plant's *average monthly* throughput was consistently above 200 tpd ("tpd"), with around 220 tpd achieved with some consistency, and an average monthly throughput of almost 230 tpd was achieved in March 2016.[633] Further, the *actual daily* data confirms that there was reasonable consistency of a daily plant feed of around 225 tpd being achieved, and a number of occasions when 250 tpd was exceeded in both March and April 2016.[634]

191. These tonnages had already been achieved when the mine was in the early stages of its life and, as both Mr. Kappes and SRK confirm, it is reasonable to assume that the plant's throughput could have been increased over time, if desired.[635] Certainly, as SRK explains, there was no technical impediment to achieving a higher throughput.[636] In fact, Claimants had designed the Tambor plant with an operating throughput of 200-240 tpd and considered it capable of much higher processing capacity.[637] Indeed, in March 2016, the report of a professional external consultant who visited the site to assess the plant noted that, while the plant originally lacked capacity in the flotation circuit, Claimants and Exmingua addressed the issue and progressively increased capacity by adding column flotation cells.[638]

192. Guatemala's further allegation that Exmingua was not authorized to operate at a rate exceeding 150 tpd[639] is also untrue. Guatemala bases its assertion on the fact that the EIA refers to a *nominal* throughput of 150 tpd,[640] while ignoring that the EIA also refers to a *design* throughput of 200 tpd,[641] and, in any event misconstrues the import of the former term. These are industry terms for the design of processing plants, where "nominal" denotes typical performance and "design"

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[632] Resp's C-M ¶¶ 791-792.

[633] SRK II ¶¶ 44-45, Figure 3-1; Daily Plant Summary Data for Oct. 2014 – May 2016 (C-0125).

[634] SRK II ¶¶ 46-47, Figure 3-2; Daily Plant Summary Data for Oct. 2014 – May 2016 (C-0125).

[635] SRK II ¶ 47; Kappes II ¶¶ 67-70.

[636] SRK II ¶ 48; Kappes II ¶¶ 67-70.

[637] Kappes II ¶ 68; Design Criteria dated 31 Aug. 2010, § 1.7 (C-0126) (indicating normal mill rate of 200 tpd and design mill rate of 240 tpd).

[638] SRK II ¶ 58; Bill A. Hancock, "El Tambor Trip Report. Review Process and Chemical Programs," *Argo Consulting*, 17-18 Mar. 2016, at 1 (C-0869).

[639] Resp's C-M ¶ 793.

[640] *Id.* ¶ 793; Progreso VII EIA, at 92 (C-0082).

[641] Progreso VII EIA, at 72, 92 (C-0082). The Progreso VII EIA also notes that the tailings ponds were able to accommodate a throughput of 200tpd. *See id*., at 577, 587-588 (C-0082); Amendment to Progresso VII EIA dated 1 Apr. 2011, at 186 (C-0089).

incorporates an operating margin to allow for orebody variability and process disturbances.[642] Neither of these terms constitutes a "limit" as Guatemala falsely asserts.[643]

193. This is supported by the fact that the MARN and the MEM conducted a number of inspections at the Progresso VII site during which they acknowledged that Exmingua was processing in excess of 150 tpd without criticizing it or recommending any changes to the plant's processing rate (whereas they made several other recommendations, as Guatemala emphasizes[644]). For example, following the February 2015 inspection that Guatemala argues identified several areas of non-compliance, the MEM acknowledged that the mine was "removing from 200 to 250 tons of ore" and "processing 200 tons daily."[645] Following the subsequent November 2015 inspection, the MARN observed that "[d]ue to plant capacity, about 200-250 tpd continues to be exploited,"[646] and the MEM noted that Exmingua was extracting and processing 200 to 250 tons of material each day.[647] Neither regulatory body indicated that the extraction and processing rate should be reduced. Guatemala was therefore well aware of the extent of Exmingua's operations at the time they were ongoing and did not consider it excessive or unlawful.

194. *Second*, Guatemala challenges the metallurgical recovery rate of Exmingua's flotation plant and questions whether Claimants and Exmingua made any updates or modifications to the plant to improve its gold recovery rate.[648] Guatemala's challenges are unwarranted.

195. Claimants began designing and constructing a modular, flotation processing plant and laboratory immediately after their acquisition of Radius' interest in Exmingua in 2008, running comprehensive flotation tests and using samples of the Tambor ore to obtain a high recovery rate.[649] As a result of its design work and testing, when Claimants finished building the plant at KCA's office in Reno in 2010, it had achieved a 90% recovery rate.[650] After Claimants finished testing and building

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[642] SRK II ¶ 50.

[643] *Id.*

[644] *See supra* § II.C.2.

[645] MEM 2015 February Inspection, at 5, 11, 19 (C-0627).

[646] MARN 2015 November Inspection, at 3 (C-0629).

[647] MEM 2015 November Inspection, at 6, 10, 23 (C-0628) (noting a "daily extraction of 200 to 250 tons" and that the plant "is [] fed [] 240 tons per day" and is "in operation with a daily feed of 240 tons of ore").

[648] Resp's C-M ¶¶ 794-795.

[649] Clms' Mem. ¶ 55.

[650] Kappes I ¶ 110; Kappes II ¶ 63.

the plant, they transported the plant in parts to Guatemala in March 2012,[651] installing the plant at Tambor after the completion of the construction works in November 2014.[652]

196. Guatemala's comments that the average rate of recovery for the *entire* period of the plant's operation was 62%[653] is misleading, because the data for this period includes episodes of plant ramp-up, as well as times when the plant was not operating consistently.[654] The data shows that, over time, the plant had a clear trend of increasing recovery rates.[655] Indeed, Guatemala ignores that the most recent plant performance data from January to May 2016 shows that the plant consistently was improving its recovery rate, which averaged approximately 77% throughout April and early May 2016,[656] on occasions reached a 90% recovery rate in 2016,[657] and had a clear trend of increasing recovery.[658] This was due to the efforts of Claimants and Exmingua, who continued to update and modify the flotation plant in order to adapt to the processing and increase its recovery. For instance, they updated the flotation column design and set up,[659] and reviewed the process and chemical programs employed at the plant, which was carried out with assistance from a professional consultant.[660]

D. Guatemala Destroyed Claimants' Investments

197. As demonstrated in Claimants' Memorial, Claimants had invested substantial time, effort, and money to acquire Exmingua, obtain an exploitation license for the Progreso VII area, commence mining and processing of gold, and arrange for the sale of its gold concentrate. After a year and a half of mining, and while Exmingua was preparing to enter its next phase of underground mining, undertake further exploration and obtain its Santa Margarita exploitation license, Guatemala unlawfully shut down Exmingua's operations by suspending its Progreso VII exploitation license.[661]

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[651] Shipping documents for the flotation plant dated 21 Mar. 2012 (C-0870).

[652] Kappes I ¶¶ 60, 97.

[653] Resp's C-M ¶ 795.

[654] SRK II ¶¶ 56-57, Figure 3-3.

[655] *Id.* ¶¶ 56-57, Figure 3-3.

[656] *Id.* ¶¶ 56-57, Figure 3-3.

[657] Kappes II ¶ 63; Kappes I ¶ 111; SRK II ¶¶ 58-60; Email from D. Kappes to D. Kappes & Tambor dated 7 May 2016 (C-0131) (attaching Email from Laboratorio Tambor KCA to D. Kappes & Others dated 7 May 2016, attaching lab results dated 6 May 2016 indicating 92% recovery); Daily list of plant feed and tails grade for Oct. 2014 to May 2016 (indicating that, based on the recovered grade (i.e., feed grade less tailings grade) divided by feed grade, 80% recovery was being approached in March-April 2016) (C-0125).

[658] SRK II ¶¶ 58-60.

[659] Email from Daniel Kappes to Exmingua dated 26 June 2015 (C-0871).

[660] SRK II ¶¶ 58-60; Bill A. Hancock, "El Tambor Trip Report. Review Process and Chemical Programs," *Argo Consulting*, 17-18 Mar. 2016 (C-0869).

[661] Clms' Mem. ¶¶ 69-115, 133-142.

In early 2016, the Supreme Court's 11 November 2015 decision and the MEM's initial refusal to accept it, sparked a new wave of protests, which prevented Exmingua from bringing supplies onto the site and precluded Exmingua's consultants from conducting the social studies required for the EIA to obtain an exploitation license for the Santa Margarita area.[662] Guatemala then baselessly charged Exmingua and its employees with crimes and impounded its concentrate.[663] To date, Guatemala has failed to conduct the consultations that the Courts have held are required for Exmingua's exploitation license to be restored, thus rendering the Progreso VII license useless and foreclosing any possibility that Exmingua can obtain an exploitation license for the Santa Margarita area.

198. Guatemala fails to disprove any of this in its Counter-Memorial, as shown in detail below.

1. The Guatemalan Courts Issued Manifestly Unlawful *Amparos* Ordering The Suspension Of Exmingua's Exploitation License

199. As set forth in Claimants' Memorial, the Supreme Court on 11 November 2015 issued an *amparo provisional* suspending Exmingua's exploitation license.[664] The Supreme Court's decision did not contain any reasoning at all, save to state in a conclusory manner that "such relief is warranted by the circumstances of the case."[665] To recall, Exmingua was not a party to the proceeding, and had not even been notified of the action at that time.[666] Exmingua was officially notified of the case and of this decision only more than three months later, and then immediately appealed the Supreme Court's decision to the Constitutional Court.[667]

200. On 5 May 2016, the Constitutional Court rejected Exmingua's appeal and affirmed the Supreme Court's *amparo provisional* suspending Exmingua's exploitation license, but with the following modification: "provided, however that the State of Guatemala, through the [MEM] may reinstate the validity of the exploitation license upon conducting and completing, as soon as practicable, the prior and informed consultation procedure pursuant to Convention No. 169 . . . ."[668]

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[662] Clms' Mem. ¶¶ 116-124.

[663] Clms' Mem. ¶¶ 125-132.

[664] Supreme Court of Guatemala, Case No. 1592-2014, Decision dated 11 Nov. 2015, at 1 [at 1 ENG] (C-0004); *see also* Clms' Mem. ¶¶ 74-87.

[665] Supreme Court of Guatemala, Case No. 1592-2014, Decision dated 11 Nov. 2015, at 1 [at 1 ENG] (C-0004); *see also* Clms' Mem. ¶ 86.

[666] Notice of service on Exmingua dated 22 Feb. 2016 (C-0470); *see also infra*, § II.D.1.a(i); Clms' Mem. ¶¶ 87, 277-279; Fuentes I ¶¶ 94, 184; Fuentes II ¶ 106.

[667] Exmingua's appeal dated 23 Feb. 2016 of the Supreme Court's 11 Nov. 2015 decision in Case No. 1592-2014 (C-0005); *see also* Clms' Mem. ¶ 88; Fuentes I ¶ 94.

[668] Constitutional Court of Guatemala, Consolidated Cases Nos. 795-2016 and 1380-2016, Decision dated 5 May 2016, at 4 [at 2-3 ENG] (C-0143); *see also* Clms' Mem. ¶ 89.

Like the Supreme Court's 11 November 2015 decision, the Constitutional Court's 5 May 2016 decision lacked any explanation or analysis supporting the suspension or the modification.

201. Exmingua immediately filed a request for amplification and clarification seeking clarity as to exactly when Exmingua would regain the use of its license.[669] The Constitutional Court rejected Exmingua's request three days later, stating without any explanation that "the decision [of 5 May 2016] is clear as to when and how the mining exploitation license may come again into effect."[670] On 8 June 2017, Exmingua further petitioned the Constitutional Court to revoke its 5 May 2016 decision, but the Court rejected that request as well, and did so again without any explanation, stating merely that, "at this Court's discretion, there remain circumstances which make it advisable to maintain this provisional protection."[671]

202. In the meantime, on 28 June 2016, the Supreme Court issued its *amparo definitivo*, by which it ordered the continued suspension of Exmingua's exploitation license, found that the MEM had violated the right to consultation of the indigenous communities, and determined that "the [MEM] shall determine the procedure to be followed to conduct consultations through such means as will allow the opinion of such peoples as might be affected to be truthfully obtained . . . ."[672] The Court also ordered the MEM "to rule according to law and pursuant to this decision, observing the rights and guarantees of those represented by the petitioner" and "to comply with this decision within a period of three business days following service of the final decision and related documents . . . ."[673] On 30 June 2016, Exmingua appealed this decision to the Constitutional Court.[674]

203. On 4 August 2016, the Constitutional Court held a public hearing on Exmingua's appeal of the Supreme Court's 28 June 2016 *amparo definitivo* decision.[675]

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[669] Constitutional Court of Guatemala, Consolidated Cases Nos. 795-2016 and 1380-2016, Exmingua's Request for Amplification and Clarification dated 6 May 2016 ¶¶ 6, 9 (C-0538); *see also* Clms' Mem. ¶ 90.

[670] Constitutional Court of Guatemala, Consolidated Cases Nos. 795-2016 and 1380-2016, Decision dated 9 May 2016 on Exmingua's request for amplification and clarification, at 4 [at 2 ENG] (C-0554); *see also* Clms' Mem. ¶ 90.

[671] Constitutional Court of Guatemala, Order on Appeals of *Amparo* Decision dated 5 Oct. 2017 (C-0563); *see also* Clms' Mem. ¶ 165.

[672] Supreme Court of Guatemala, Case No. 1592-2014, Decision dated 28 June 2016, at 31-32 [at 18 ENG] (C-0144); *see also* Clms' Mem. ¶¶ 91-92; Fuentes I ¶ 98; Fuentes II ¶ 104.

[673] Supreme Court of Guatemala, Case No. 1592-2014, Decision dated 28 June 2016, at 33 [at 19 ENG] (C-0144).

[674] Exmingua's appeal dated 30 June 2016 of the Supreme Court's 28 June 2016 decision (C-0475); *see also* Clms' Mem. ¶ 93; Fuentes I ¶ 98.

[675] *See* Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Exmingua's request dated 4 Apr. 2018 to render a decision on its appeal ¶ 1 (C-0544) (referring to the public hearing held on 4 Aug. 2016); *see also* Clms' Mem. ¶ 96.

204. On 5 October 2017, the Constitutional Court rejected Exmingua's request to revoke its 5 May 2016 decision.[676] The order, once again, contained no reasoning, save that "at this Court's discretion, there remain circumstances which make it advisable to maintain this provisional protection."[677]

205. Not having received a decision on its appeal in 18 months, Exmingua on 4 April 2018 petitioned the Constitutional Court to render its decision, referencing Article 66 of the *Amparo* Law, under which the Constitutional Court must render a decision within five calendar days of the hearing.[678] In its petition, Exmingua pointed out that, while the Court's 5 May 2016 decision allowed the MEM to lift the suspension of its exploitation license upon conducting and completing consultations under ILO Convention 169 "as soon as practicable," the suspension continued to be in effect "to the detriment of workers, suppliers, vendors, shareholders and representatives of [Exmingua], whose capital investments are also of benefit to neighboring communities."[679] Exmingua further emphasized that the continuing suspension "has caused [Exmingua] to incur severe, serious damages and losses, leading to a breach of the Government's obligation to create suitable conditions for promoting domestic and foreign investment."[680] Exmingua, however, had to wait more than another two years for the Constitutional Court to render its decision.

206. On 28 May 2020, the Constitutional Court issued an order requesting the MEM to submit, within three days, "a detailed report . . . regarding the actions taken to comply with the order issued by [the] Court on 5 May 2016."[681] Unbeknownst to Exmingua at this time, the MEM on 11 June 2020 filed with the Court a report providing a chronology of the actions it had taken since 2016 to prepare for consultations, including by reaching out to the local communities.[682] This report was not notified to Exmingua until 3 March 2021 – more than eight months later, during the document production

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[676] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Order dated 5 Oct. 2017 rejecting Exmingua's request for revocation, at 1 [at 1 ENG] (C-0563).

[677] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Order dated 5 Oct. 2017 rejecting Exmingua's request for revocation, at 1 [at 1 ENG] (C-0563).

[678] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Exmingua's request dated 4 Apr. 2018 to render a decision on its appeal ¶ 2 (C-0544). As Professor Fuentes notes, *amparo* decisions are expected to be ruled on expeditiously in light of the five-day rule's objective. Fuentes I ¶ 154; *see also* Clms' Mem. ¶ 96; *Amparo*, *Habeas Corpus* and Constitutionality Law, Art. 66 (C-0146).

[679] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Exmingua's request dated 4 Apr. 2018 to render a decision on its appeal ¶¶ 3-4 (C-0544).

[680] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Exmingua's request dated 4 Apr. 2018 to render a decision on its appeal ¶ 4 (C-0544).

[681] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Order dated 28 May 2016, at 1 [at 1 ENG] (C-0553).

[682] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, MEM Report dated 10 June 2011, submitted to the Constitutional Court on 11 June 2020 under cover of Letter from the MEM dated 9 June 2020 (C-0872).

phase of this Arbitration, despite Exmingua's repeated requests and attempts to obtain it or, even, any information as to whether the report had actually been filed.[683]

207. On 23 June 2020 – a few weeks before Claimants filed their Memorial – Exmingua was notified of the Constitutional Court's decision dated 11 June 2020 rejecting Exmingua's appeal of the Supreme Court's decision rendered four years earlier.[684] In its 11 June 2020 decision, the Constitutional Court rejected Exmingua's appeal of the Supreme Court's 28 June 2016 decision, thereby upholding the continuing suspension of Exmingua's exploitation license, but also modified it, including by directing the MEM to conduct the consultations under ILO Convention 169 within 12 months based on guidelines set out in the Court's decision, and by imposing additional conditions for Exmingua to be allowed to resume operations, as detailed below.[685]

208. As regards the consultations, the Constitutional Court specifically ordered the MEM:

- To "determine the demographic data of the indigenous peoples foreseeably affected by the "Progreso VII Derivada" exploitation license, in order to identify the potential holders of the right of consultation provided for in [ILO] Convention No. 169 . . . within *15 [] days* following the date on which this decision becomes final;"[686]
- To conduct the consultation process and, in doing so, to "follow the provisions of the said Convention No. 169, as complemented by the guidelines set forth in this decision;"[687]
- To "complete the consultation process provided for under Convention No. 169 . . . within a term of **twelve months** as from the date on which this decision becomes final;"[688]
- "During such term, [to] submit detailed quarterly reports describing the advances in the consultation process;"[689] and
- "Upon expiration of said term, [to] submit a complete and exhaustive report on the process to the Amparo Court of first instance, which shall, after hearing all of the

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[683] *See* Clms' Mem. ¶ 134.

[684] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Notification dated 23 June 2020 of 11 June 2020 ruling (C-0495); *see also* Clms' Mem. ¶ 135; Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision dated 11 June 2020 (C-0145).

[685] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision dated 11 June 2020, at 84-90 [at 42-45 ENG] (C-0145).

[686] *Id*. at 85 [at 42 ENG] (emphasis added).

[687] *Id*.

[688] *Id*. at 85-86 [at 42-43 ENG] (emphasis in original).

[689] *Id*. at 86 [at 43 ENG].

parties to the consultation process, verify the fulfilment of the applicable orders for the purpose of ensuring the enforcement of this decision."[690]

209. In addition to completion of consultations under ILO Convention 169, the Constitutional Court also imposed the following conditions for Exmingua to be allowed to resume operations under its exploitation license:

- "Upon completion of the consultation process, and provided the development of the project authorized by means of the 'Progreso VII Derivada' license is found not to threaten the existence of the indigenous peoples living within its area of influence, the mining company shall be allowed to resume its activities . . . ."[691]

- "Conditions for the continuation of exploitation works under the 'Progreso VII Derivada' exploitation license: should it be decided, as a result of the consultation process with the indigenous people living in the area of influence of the project authorized by the 'Progreso VII Derivada' license, that the applicable works do not affect the existence of the said peoples, mining activities under said license may be resumed provided the following conditions have been met: upon completion of the consultation process, the Ministry of Energy and Mines shall, within 15 (fifteen) days, issue all such resolutions as may be necessary to ensure the effective enforcement of the agreements reached by the parties as a result of the aforementioned consultation process, an provide for the adjustment of all license conditions to reflect the adequate fulfilment of said agreements. The decisions in said resolutions may affect the conditions of the license. Once the aforementioned resolutions have been issued, the mining company may immediately resume its activities."[692]

210. As demonstrated in Claimants' Memorial and the expert opinions of Professor Fuentes, and as further demonstrated below, the decisions of the Guatemalan Supreme Court and Constitutional Court, which granted and affirmed *amparos* ordering the suspension of Exmingua's exploitation license, seriously violated Exmingua's fundamental procedural and due process rights and its substantive acquired rights under Guatemalan law, and discriminated against Exmingua.[693]

a. Guatemala's Courts Seriously Violated Exmingua's Fundamental Procedural And Due Process Rights

211. In their Memorial, supported by Professor Fuentes' expert opinion, Claimants demonstrated that the Guatemalan court proceedings involving and affecting Exmingua's Progreso VII exploitation

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[690] *Id*. at 86 [at 43 ENG].

[691] *Id*. at 87 [at 43 ENG].

[692] *Id*. at 90 [at 45 ENG].

[693] Clms' Mem. ¶¶ 70-96, 103-115, 133-142, 274-312; Fuentes I ¶¶ 89-184; Fuentes II ¶¶ 103-162.

license were marred by a series of severe procedural deficiencies in blatant violation of mandatory rules of Guatemalan law and in fundamental disregard of Exmingua's due process rights. This resulted in undermining Exmingua's vested rights and leaving it unprotected by the law – an outcome that not by coincidence aligned with Guatemala's politically motivated *de facto* moratorium on the issuance of new mining licenses and on operations under existing licenses until the Guatemalan Congress adopts a new mining law, which it has not done.[694]

i. Guatemala's Supreme Court Repeatedly Failed To Serve Timely Notice On Exmingua, Violating Its Right To Be Heard

212. As demonstrated in Claimants' Memorial, supported by Professor Fuentes' expert opinion, the Supreme Court violated Exmingua's right to be heard under Articles 5, 34 and 35 of the *Amparo*, *Habeas Corpus* and Constitutionality Law ("*Amparo* Law") by (i) failing to serve timely notice on Exmingua of the *amparo* action, by which CALAS on 28 August 2014 challenged the validity of Exmingua's exploitation license, and (ii) failing to serve the related court papers, including the Supreme Court's 11 November 2015 *amparo provisional*, until 22 February 2016, eighteen months after CALAS commenced the *amparo* action and more than three months *after* the Supreme Court ordered the MEM to suspend Exmingua's exploitation license.[695] Professor Fuentes concluded that this was "clearly in violation of the *Amparo* Law," and the Supreme Court's "decision . . . violate[d] the due process of law rights [of Exmingua], since the Supreme Court granted a provisional *amparo* that affected Exmingua's rights before Exmingua became involved in the *amparo* proceedings."[696]

213. Guatemala's expert, Professor Richter, merely denies the existence of such a violation and quotes selectively from Articles 34 and 35 of the *Amparo* Law, without offering any analysis.[697] As Professor Fuentes points out, those provisions confirm that the Supreme Court was obligated to hear Exmingua within 48 hours after the MEM filed its submission in the case,[698] which the MEM did on 5

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[694] Clms' Mem. ¶¶ 136-139; 276-295; Fuentes I ¶¶ 106-162; Fuentes II ¶¶ 106, 110-159.

[695] Clms' Mem. ¶¶ 87, 277-279; Fuentes I ¶¶ 94, 183; *see also* Fuentes II ¶ 106.

[696] Fuentes I ¶¶ 94, 184; Clms' Mem. ¶ 277. The *Amparo* Law obligates the parties to an *amparo* proceeding to inform the court if they are aware that any third party is "directly interested" in the outcome of the case, in which circumstance the court must hear that third party. *Amparo* Law, Art. 34 (C-0416). The *Amparo* Law also provides that notices are to be served at the latest on the day after the date of the relevant decision. *Amparo* Law, Art. 5 (C-0416).

[697] Richter ¶ 136.

[698] Fuentes II ¶ 106.

September 2014,[699] more than one year before the Supreme Court on 11 November 2015 issued the *amparo provisional* ordering the MEM to suspend Exmingua's exploitation license.[700]

ii. Guatemala's Courts Disregarded The *Amparo* Law's Mandatory Timeliness Requirement, Violating The Constitutional Principle Of Legal Certainty

214. As demonstrated in Claimants' Memorial, supported by Professor Fuentes' expert opinion, by admitting CALAS's *amparo* action against the MEM, the Supreme Court and the Constitutional Court entirely disregarded Article 20 of the *Amparo* Law, which requires that such an action must be filed within 30 days from the date on which the aggrieved party receives notice or becomes aware of the measure that it seeks to challenge.[701] As Professor Fuentes explained, such a limitation period exists by virtue of the constitutional principles of legal security and certainty.[702] Indeed, the Constitutional Court has held with respect to Article 20 of the *Amparo* Law that, "when the temporality requirement is not met, the Court is prevented from examining the merits of the case."[703] By contrast, the Supreme Court and the Constitutional Court admitted CALAS's action despite the fact that CALAS filed it (on 28 August 2014) more than four years after the public consultation process for the purpose of the EIA had been conducted in June 2010 and more than three years after the MEM had published a public notice of Exmingua's pending application for an exploitation license in the Official Gazette on 22 June 2011, which had the effect of notifying third parties about the application and creating a presumption of public awareness of the same.[704]

215. In its Counter-Memorial, Guatemala does not dispute the above, but asserts that the 30-day time limit does not apply to cases of "continued unconstitutionality."[705] Referring to the Richter Opinion, Guatemala further asserts that the Constitutional Court has held this view "throughout the development of the jurisprudence on the matter of consultation with indigenous peoples."[706] The Richter Opinion refers to a number of decisions by the Constitutional Court that purportedly support the view that the limitation period under Article 20 of the *Amparo* Law does not apply in cases of a

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[699] MEM's Response to CALAS's application for *amparo nuevo* dated 5 Sept. 2014 (C-0465); Clms' Mem. ¶ 72.

[700] Supreme Court of Guatemala, Case No. 1592-2014, Decision dated 11 Nov. 2015 (C-0004); Clms' Mem. ¶ 74.

[701] Clms' Mem. ¶¶ 76, 137, 281-286; Fuentes I ¶¶ 110-123; *see also* Fuentes II ¶¶ 114-125; *Amparo* Law, Art. 20 (C-0416).

[702] Fuentes I ¶ 110.

[703] Constitutional Court of Guatemala, Case No. 3173-2016, Decision dated 17 Oct. 2016, at 11 [at 2 ENG] (C-0489); Fuentes I ¶ 111; *see also* Fuentes II ¶ 117.

[704] Fuentes I ¶¶ 15-18; Clms' Mem. ¶¶ 33, 38, 282; *see also* Fuentes II ¶¶ 118-119.

[705] Resp's C-M ¶ 127.

[706] *Id.* ¶ 127 (citing Richter ¶¶ 83-84).

"continuing grievance," where the *amparo* action challenges an omission, such as a failure to conduct consultations under ILO Convention 169.[707]

216. As Professor Fuentes observes, "[w]hile the language of Article 20 provides for certain exceptions, it does *not* provide an exception for cases in which the subject matter of the claim is a failure to act, and the Constitutional Court decisions cited in the Richter Opinion do not indicate otherwise."[708] Moreover, the Richter Opinion concedes that neither the law nor doctrine provides an established definition of what constitutes a "continuing grievance."[709]

217. Professor Fuentes further notes that the Constitutional Court rendered the 11 decisions cited in the Richter Opinion between 2015 and 2020, and that the two earliest decisions do not even reference Article 20 of the *Amparo* Law or otherwise address the issue of timeliness.[710] The third and fourth decisions, which the Court rendered in November 2015 and January 2016, respectively, "do address the issue of timeliness, but do not support the rationale that a failure to act results in a continuing grievance."[711] As Professor Fuentes explains, the petitioners in those actions challenged exploration licenses that had expired, but the license holders had applied for an extension, which was pending before the MEM.[712] In these distinct circumstances, the Court held "that the petitioners had a continuing interest in seeking an *amparo* ordering the MEM to hold consultations before it granted the extension."[713] Thus, it was only after the 11 November 2015 Supreme Court decision in CALAS's *amparo* action affecting Exmingua that the Constitutional Court changed course and began disregarding the 30-day limitation period in similar cases, in which the subject matter was the MEM's failure to conduct consultations under ILO Convention 169.[714]

218. Professor Fuentes confirms that, by this deviation from its established jurisprudence, the Constitutional Court disregarded the constitutional principle of legal certainty.[715] It also violated Article 49(c) of the *Amparo* Law, which contains an explicit provision addressing the challenge of an

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[707] Richter ¶ 84.
[708] Fuentes II ¶ 120 (emphasis added).
[709] Richter ¶ 84, n. 57; Fuentes II ¶ 119.
[710] Fuentes II ¶¶ 120-121.
[711] *Id.* ¶ 121.
[712] *Id.*
[713] *Id.*
[714] *Id.* ¶ 122.
[715] *Id.*

omission and provides that, in such cases, the court is to guide itself by "general principles of law, custom, precedents in other cases, [and] the analogy of other regulations and equity . . . ."[716]

219. As Professor Fuentes already had explained in his First Opinion, these decisions also disregarded Article 10 of the Judiciary Law, which provides that, "[w]hen a law is clear, the literal interpretation of its terms will not be neglected under the pretext of considering the underlying spirit of the law."[717] Accordingly, Professor Fuentes concluded that "the Supreme Court and the Constitutional Court should have applied [ ] Article 20, whose literal meaning is clear."[718]

220. The Richter Opinion seeks to counter this conclusion by asserting that the rule of interpretation provided in Article 10 does not apply to supra-constitutional or constitutional rules, which should be interpreted according to their own rules.[719] As Professor Fuentes explains, however, this view is faulty because no such special rules exist under Guatemalan law; rather, "Article 10 of the Judiciary Law is the only existing set of codified rules addressing the interpretation of legal rules, and it covers the key constitutional methods of interpretation, including exegetic, teleological, systematic and extensive interpretation."[720] Moreover, as Professor Fuentes further notes, under Article 4(2) of the Judiciary Law, "[a]cts carried out under the text of a rule that pursue a result prohibited by or contrary to the legal order shall be deemed to be executed in fraud of the law and shall not preclude the proper application of the rules whose circumvention has been attempted."[721]

221. Against this background, it is inaccurate and misleading for Guatemala to state in its Counter-Memorial that the Constitutional Court has upheld the inapplicability of the 30-day period under Article 20 "throughout the development of [its] jurisprudence on the matter of consultation with indigenous peoples."[722]

iii. Guatemala's Courts Disregarded The *Amparo* Law's Mandatory Exhaustion-Of-Remedies Requirement

222. As demonstrated in Claimants' Memorial, supported by Professor Fuentes' expert opinion, the Supreme Court and the Constitutional Court admitted CALAS's *amparo* action in violation of Article 19 of the *Amparo* Law, which required CALAS first to exhaust "all ordinary court and

[716] *Id.* ¶ 123; *Amparo* Law, Art. 49(c) (C-0416).
[717] Judiciary Law, Art. 10 (C-0415); Fuentes I ¶ 121; *see also* Fuentes II ¶ 125.
[718] Fuentes II ¶ 124.
[719] Richter ¶ 143; *see also* Fuentes II ¶ 125.
[720] Fuentes II ¶ 125.
[721] *Id.*; Judiciary Law, Art. 4(2) (C-0415).
[722] Resp's C-M ¶ 127.

administrative remedies available to adequately dispose of the matter."[723] As Professor Fuentes emphasized in his First Opinion, an *amparo* is "extraordinary" in nature and is admissible "[o]nly when the relevant remedies have been exhausted and the threat, restriction or violation of a right persists."[724] Indeed, the Supreme Court initially dismissed CALAS's action on this very ground,[725] but the Constitutional Court overruled the dismissal on appeal, finding that no administrative remedy was available to CALAS.[726] As Professor Fuentes explained in his First Opinion, the Constitutional Court's reasoning to exempt CALAS from the exhaustion of remedies requirement was "clearly wrong," because CALAS neither availed itself of the opportunity to object in the public participation process before the MEM granted Exmingua the exploitation license, nor initiated an action for reconsideration of the issuance of the license in a contentious-administrative proceeding.[727]

223. In its Counter-Memorial, Guatemala merely paraphrases the Constitutional Court's ruling and summarily denies Claimants' arguments without offering any analysis.[728] The Richter Opinion asserts that "[t]he prior exhaustion of any remedy is not required when the petitioner has not been legally summoned in the proceeding in which the alleged harmful act originated."[729] The Richter Opinion further asserts that "[t]here is no obligation to exhaust remedies when the act in question affects the rights of third parties unrelated to the process in which it was issued, since they lack the opportunity to defen[d] themselves . . . ."[730] According to Professor Richter, CALAS was not required to exhaust any remedies because "CALAS . . . has not intervened in the administrative process of granting the Progreso VII Derivada mining license as a party, and therefore has not been notified of any of the actions taken within said process."[731] Moreover, according to Professor Richter, "upon the lack of consultation with indigenous peoples regarding the Progreso VII Derivada mining project, there was no means to challenge or ordinary legal mechanism established by law whereby such conduct of omission could be challenged."[732]

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[723] Clms' Mem. ¶¶ 75, 137, 287; Fuentes I ¶¶ 124-133; *see also* Fuentes II ¶¶ 126-145; *Amparo* Law, Art. 19 (C-0416).

[724] Fuentes I ¶ 125 (quoting Mauro Roderico Chacón Corrado, *El amparo constitucional en Guatemala*, Revista IUS, vol. 5 no. 27 Puebla Jan./June 2011, at 165 [at 2 ENG] (C-0492)); *see also* Clms' Mem. ¶ 75.

[725] Supreme Court of Guatemala, Case No. 1592-2014, Decision dated 5 Sept. 2014, at 4 [at 3 ENG] (C-0466); *see also* Clms' Mem. ¶ 287; Fuentes I ¶ 127; Fuentes II ¶ 126.

[726] Constitutional Court of Guatemala, Case No. 5769-2014, Decision dated 3 Nov. 2015, at 4-6 [at 1-2 ENG] (C-0468); *see also* Fuentes I ¶ 128; Fuentes II ¶ 126.

[727] Fuentes I ¶¶ 129-133; Clms' Mem. ¶¶ 75, 287; *see also* Fuentes II ¶¶ 126, 128-135.

[728] Resp's C-M ¶¶ 125-126.

[729] Richter ¶ 77.

[730] *Id.*

[731] *Id.*

[732] *Id.* ¶ 86.

224. As Professor Fuentes points out, this argument not only is circular, but also ignores the undisputed fact in the instant case that the MEM did give public notice of Exmingua's application for the Progreso VII exploitation license, first in 2010 and then again in 2011, which "had the effect of notifying all third parties, informing the public about the administrative proceeding for the grant of the license, and inviting anyone claiming to be an interested party to express their opinions and any objections to the project."[733] Accordingly, as Professor Fuentes concludes, CALAS received notice of the administrative proceeding open to it as a matter of law.[734]

225. Moreover, as Professor Fuentes explained in his First Opinion, and as he confirms in his Second Opinion, ordinary remedies to challenge the MEM's grant of the exploitation license were indeed available to CALAS.[735] *First*, CALAS could have participated in the objection procedure under Article 47 of the Mining Law before the MEM granted the license.[736] *Second*, CALAS subsequently could have filed an appeal for reconsideration of the MEM's decision to grant the license under Article 9 of the Contentious Administrative Law.[737] As Professor Fuentes explains, under Article 15 of that Law, the scope of a reconsideration decision is full review of the challenged measure.[738] *Third*, in the event CALAS's appeal for reconsideration was rejected, CALAS had the further option to commence a contentious-administrative proceeding under Article 19 of that Law.[739]

226. It is undisputed that CALAS pursued none of these available ordinary remedies before initiating its *amparo* action. Consequently, as Professor Fuentes explains, under Article 153 of the Judiciary Law, "the MEM's decision to grant the exploitation license became final and could no longer be challenged."[740]

227. As Professor Fuentes further explains, the exhaustion of remedies requirement follows not only from Article 19 of the *Amparo* Law, but also from its Article 10, which provides that an *amparo* action is admissible only "where the threat, restriction, or violation of the rights guaranteed by the constitution and the law persists *after* the petitioner has exhausted any administrative proceedings

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[733] Fuentes II ¶ 128; *see also id*. ¶ 118; Fuentes I ¶¶ 12-18, 130; Clms' Mem. ¶¶ 33, 37-38; Public Notice for the Progreso VII EIA published in Siglo XXI and Al Dia of 27 May 2010 (C-0083); Letter from Exmingua to the MEM dated 22 June 2011 (attaching copy of published notices) (C-0134).

[734] Fuentes II ¶¶ 129, 135.

[735] Fuentes I ¶¶ 129-133; Fuentes II ¶¶ 126, 128-135; *see also* Clms' Mem. ¶¶ 75, 287.

[736] Fuentes I ¶¶ 129-130, 133; Fuentes II ¶¶ 126, 128-129; *see also* Clms' Mem. ¶¶ 75, 287.

[737] Fuentes I ¶ 133; Fuentes II ¶¶ 130-131; *see also* Clms' Mem. ¶ 287.

[738] Fuentes I ¶ 133; Fuentes II ¶ 131; *see also* Clms' Mem. ¶ 287.

[739] Fuentes I ¶ 133; Fuentes II ¶ 132; *see also* Clms' Mem. ¶ 287.

[740] Fuentes II ¶¶ 135-136; *see also* Fuentes I ¶ 21; Clms' Mem. ¶¶ 33, 76.

provided by law."[741] It also follows from the principle of legal security, which, as the Constitutional Court has held, "is crystallized through the observance of other principles, such as due process, legality, non-retroactivity, and *lex certa*, supported by the notions of *res judicata*, limitations and time-bars, among others."[742]

228. Professor Richter further argues that the exhaustion of remedies requirement does not apply in actions alleging a failure to act, such as the MEM's failure to conduct consultations under ILO Convention 169.[743] Professor Richter cites 13 decisions of the Constitutional Court in support.[744]

229. As Professor Fuentes points out, however, six of these decisions do not even address the exhaustion of remedies requirement.[745] Four additional decisions are distinguishable, as they concern challenges of municipal council decisions, where an appeal for reconsideration under Article 157 of the Municipal Code was not available to the petitioners, who were third parties, unlike the remedies under the Mining Law, which are available to third parties.[746]

230. In only three of the 13 decisions cited in the Richter Opinion did the Constitutional Court actually hold that the exhaustion of remedies requirement did not apply in cases challenging the MEM's omission to conduct consultations.[747] As Professor Fuentes notes, these three decisions, all of which were issued in 2017 and 2018, "mark an abrupt change and decisive change in the jurisprudence of the Constitutional Court, whereby the Court ignored the law and its own precedents and overstepped its role by taking on the role of the Legislative Branch, the only one that was responsible for enacting the law that would regulate the implementation of the consultations under ILO Convention 169."[748]

231. In this respect, Professor Richter asserts that Article 43 of the *Amparo* Law authorizes the Constitutional Court to develop procedural rules, admissibility requirements and exceptions relating to *amparo* proceedings jurisprudentially.[749] As Professor Fuentes points out, however, jurisprudential changes of direction "are rare and extreme, but they occurred relatively frequently during the Seventh

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[741] Fuentes II ¶ 137 (emphasis added).

[742] *Id.* ¶ 136 (quoting Constitutional Court of Guatemala, Case No. 4833-2013, Decision dated 5 Mar. 2014, at 9 [at 1 ENG] (C-0427)).

[743] Richter ¶¶ 77, 87.

[744] *Id.*, nn. 53, 70-80.

[745] Fuentes II ¶ 139.

[746] *Id.*

[747] *Id.* ¶ 140.

[748] *Id.*

[749] Richter ¶ 144.

Magistracy of the Constitutional Court, which spanned the period from 2016 to 2021."[750] In his inaugural address on 14 April 2021, the current President of the Constitutional Court criticized this development, emphasizing that, under Article 43 of the *Amparo* Law, any departure by the Court from its own jurisprudence "must be the product of a duly reasoned innovation and not the result of a selective, casuistic, or capricious application."[751]

iv. Guatemala's Courts Disregarded The *Amparo* Law's Mandatory Standing Requirement

232. As demonstrated in Claimants' Memorial, supported by Professor Fuentes' expert opinion, by admitting CALAS's *amparo* action against the MEM, the Supreme Court and the Constitutional Court disregarded the established rule governing standing to sue under Article 25 of the *Amparo* Law, which allows only the Public Prosecutor's Office and the Human Rights Ombudsman to file an *amparo* action on behalf of a group, given that CALAS lacked any personal or direct interest in the matter.[752] Both Courts did so over the repeated objections to CALAS's standing by Exmingua, the MEM, and the Attorney General's Office.[753]

233. In its Counter-Memorial, Guatemala fails to engage with this issue, and merely states in a single sentence that the Constitutional Court concluded that CALAS had standing.[754]

234. Professor Richter, in his opinion, concedes that, for an *amparo* action to be admissible, the standing requirement is "essential . . . in order to make the analysis and ruling on the merits viable."[755] In particular, the Richter Opinion states that, "given the personal nature of the amparo, no one may file an action of this nature on behalf of another, i.e., there is no public interest action, except as provided in article 25 of the law on the subject, with respect to the Human Rights Ombudsman and the Public Prosecutor's Office."[756]

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[750] Fuentes II ¶ 142.

[751] Roberto Molina Barreto, "The Role of the Constitutional Court in the Republican System of Government," Inaugural Address as President of the Court, 14 Apr. 2021, at 9-10 [at 3 ENG] (C-0671); *see also* Fuentes II ¶ 143; *Amparo* Law, Art. 43 (C-0416) ("Legal doctrine. The interpretation of the rules of the Constitution and of other laws contained in the judgments of the Constitutional Court establishes legal doctrine that must be respected by the courts in the event of three judgments of that Court. However, the Constitutional Court may separate itself from its own jurisprudence, *by reasoning innovation*, and this is not mandatory for the other courts, unless three successive judgments are issued ruling in the same sense.") (emphasis added).

[752] Clms' Mem. ¶¶ 77, 138, 288-289; Fuentes I ¶¶ 134-142; *see also* Fuentes II ¶¶ 146-150.

[753] Clms' Mem. ¶ 288; Fuentes I ¶¶ 135-136; *see also* Fuentes II ¶ 148.

[754] Resp's C-M ¶ 124.

[755] Richter ¶ 88.

[756] *Id.* ¶ 89.

235. As applied specifically to CALAS, Professor Richter further concedes that, "for the hearing of the merits of the action brought by CALAS to be admissible, said entity referred [*sic*] a grievance that should derive or become [*sic*] from the act that has been expressly indicated as the claimed act."[757] The Richter Opinion continues by quoting from a 2004 decision of the Constitutional Court, which explained that the grievance "must be direct, which means, in a straight line, without intermediaries" and that "the lack of such a relationship completely nullifies the validity of the constitutional action and, therefore, makes it impossible for the amparo court to hear the merits of the case . . . ."[758]

236. Referring to two decisions of the Constitutional Court issued in 2016 and 2018, Professor Richter then asserts that the Court, in "*one of the most recent innovations* in this area," "broaden[ed] the capacity to request [an *amparo*] without expressly providing evidence of a personal and direct grievance or, as the case may be, that the person appearing does so in legal representation of a community or is entrusted with the defense of diffuse rights . . . ."[759] Professor Richter thus concedes that, in these decisions, the Constitutional Court did *not* follow established jurisprudence and reached determinations that are in direct contradiction to the law. Professor Richter further acknowledges that the Constitutional Court "has not expressly referred to [this expanded legal standing to sue] as a legal doctrine," but has applied it *only* in specific cases brought by CALAS.[760] Indeed, as already pointed out in Claimants' Memorial and by Professor Fuentes, CALAS initiated these referenced cases *after* it filed its case concerning Exmingua.[761] By ruling on these later-filed cases first, and then relying on those very decisions to support its ruling in Exmingua's case, the Court thus pulled itself up by its own bootstraps.[762]

v. Guatemala's Courts Ignored The MEM's Lack Of Standing To Be Sued

237. As demonstrated in Claimants' Memorial, supported by Professor Fuentes' expert opinion, by admitting CALAS's *amparo* action against the MEM, the Supreme Court and the Constitutional Court ignored that the MEM lacked standing to be sued in that action. This is because, in the absence of legislation implementing the right to consultations under ILO Convention 169, the MEM had no legal

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[757] *Id.* ¶ 70 (emphasis added).

[758] *Id.* ¶ 71 (quoting Constitutional Court of Guatemala, Case No. 525-2004, Decision dated 12 May 2004, at 2-3 [at 1-2 ENG] (MR-021)); *see also* Fuentes II ¶ 149.

[759] Richter ¶ 90; *see also* Fuentes II ¶ 150.

[760] Richter ¶ 91; *see also* Fuentes II ¶ 150.

[761] Clms' Mem. ¶¶ 133, 289; Fuentes I ¶ 141.

[762] Clms' Mem. ¶¶ 133, 289; *see also* Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision dated 11 June 2020, at 28-31 [at 14-16 ENG] (C-0145).

authority to conduct such consultations, and the responsibility for any such failure by the MEM to conduct consultations thus lay with the Congress.[763]

238. Guatemala fails even to mention this issue in its Counter-Memorial.[764]

239. As Professor Fuentes points out, the Richter Opinion does not dispute that, under Article 9 of the *Amparo* Law, the Congress may be sued by means of an *amparo* action.[765] Professor Richter, however, takes the narrower position that the MEM, and not the Congress, was the proper respondent in the *amparo* action brought by CALAS, because "the lack of a regulatory provision that determines the consultation procedure . . . is not related to the facts denounced, nor is it expressly controversial . . . ."[766] Reviewing the Constitutional Court's decision of 11 June 2020, Professor Fuentes notes that the decision itself directly contradicts this assertion.[767]

240. The Court's decision specifically describes the "[c]hallenged act" as "[t]he grant of the mining exploitation license . . . [to Exmingua] without previously holding a consultation . . ." in alleged violation of ILO Convention 169.[768] As Professor Fuentes notes, the MEM's only defense on the merits was that it lacked any statutory authority to conduct such consultations, and that any attempt to conduct them would have amounted to an excess of its powers.[769] Despite the fact that Congress' failure to enact legislation implementing the right to consultation thus was at the core of the dispute brought to the Courts in CALAS's *amparo* action, the Supreme Court and the Constitutional Court allowed the action to proceed against the MEM.[770]

241. Indeed, it was contradictory for the Constitutional Court to admit the action as against the MEM in view of the Court's prior consistent jurisprudence in at least ten decisions issued over a span of more than ten years finding that it was the "institutional responsibility" of the Congress to enact

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[763] Clms' Mem. ¶¶ 77, 290-291; Fuentes I ¶¶ 143-152; *see also* Fuentes II ¶¶ 151-155.

[764] *See* Resp's C-M ¶¶ 123-128.

[765] Fuentes II ¶ 152; Richter ¶ 92; *see also Amparo* Law, Art. 9 (C-0416).

[766] Richter ¶ 93.

[767] Fuentes II ¶ 153.

[768] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision dated 11 June 2020, at 1-2 [at 1 ENG] (C-0145); Fuentes II ¶ 153.

[769] Fuentes II ¶ 153; Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision dated 11 June 2020, at 18 [at 8-9 ENG] (C-0145).

[770] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision dated 11 June 2020, at 18 [at 8-9 ENG] (C-0145).

legislation to implement the right to consultations under ILO Convention 169, and expressly urging the Congress to live up to that responsibility.[771]

242. This also was contradictory in view of the fact that the Constitutional Court repeatedly prevented the Executive Branch from filling the legislative void. The Court in 2011, for instance, held that a regulation proposed by the President of Guatemala was unconstitutional because the Government had failed to provide the indigenous populations a sufficient opportunity to participate in the process of preparing the regulation.[772] And later, in 2020, the Constitutional Court rejected a request by the President of Guatemala for an advisory opinion on the constitutionality of a new proposed regulation, holding that, while it had the power under the Constitution to give an advisory opinion on a treaty, convention or draft legislation, it lacked that power with respect to a draft regulation, and suggesting that the Government submit draft legislation to the Congress instead.[773]

vi. Guatemala's Constitutional Court Excessively Delayed Ruling In The Case Concerning Exmingua's License

243. As demonstrated in Claimants' Memorial, supported by Professor Fuentes' expert opinion, by taking almost four years to issue its decision on Exmingua's appeal, the Constitutional Court violated the Constitutional principle of legal certainty and the right to a speedy trial, as well as specific time limits prescribed in the *Amparo* Law.[774] As Professor Fuentes confirmed, this constituted "excessive delay" both under these legal standards and as compared to the Court's actual practice, where it "acted quite differently – to Exmingua's disadvantage – in ruling on similar cases much faster, even when those appeals were all filed with the Court *after* Exmingua's."[775]

244. In its Counter-Memorial, Guatemala asserts that the Constitutional Court's four-year delay in issuing a decision in Exmingua's appeal was justified.[776] According to Guatemala, the delay was reasonable in light of the number of cases pending before the Constitutional Court, because during

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[771] *See* Fuentes II ¶¶ 57-69; *see also* Richter ¶ 155, n. 105 (conceding that the Constitutional Court in 10 cases has "urged [the Congress] to make effective the right of indigenous peoples to be consulted, as referred to in Articles 6 and 15 of Convention 169 of the International Labor Organization, and to legislate on the form that these consultative procedures should take, who the convening body should be and who should carry out the consultation, who may participate, when it should take place, and the effects of the results obtained.").

[772] Fuentes II ¶¶ 62-63; Constitutional Court of Guatemala, Case No. 1072-2011, Decision dated 24 Nov. 2011, at 1, 11-12 (C-0659); Ministry of Labor and Social Welfare, Guatemala, Draft Regulation for Public Consultation dated 23 Feb. 2011, Art. 1 (C-0657).

[773] Constitutional Court of Guatemala, Case No. 306-2020, Decision dated 7 July 2020, at 22-23 [at 2-4 ENG] (C-0660).

[774] Clms' Mem. ¶¶ 139, 292-294; Fuentes I ¶¶ 153-162; *see also* Fuentes II ¶¶ 156-159.

[775] Fuentes I ¶ 162 (emphasis added); Clms' Mem. ¶ 139, 292-293.

[776] Resp's C-M ¶¶ 69-74, 410-417.

this period the Court was faced with "transcendental" events, and because of the renewal of the Court's members in April 2016.[777] In this regard, the Richter Opinion notes a series of "particular features" "that have influenced the time and the manner in which the appeal was processed," including recusals, non-approval of drafts, the issuance of new drafts, corrections, health problems of the judges, and "the global COVID emergency."[778]

245. As Professor Fuentes notes, "[n]one of this, however, justifies the delay."[779] Nor does Guatemala even begin to explain, let alone justify, how these "features" did not similarly delay the proceedings in the *Oxec*, *Minera San Rafael*, and *CGN* cases. As demonstrated in Claimants' Memorial and confirmed by Professor Fuentes, all of these cases are comparable to the Exmingua case in terms of the procedural and substantive issues involved, and the *amparo* appeals in those cases were filed *after* Exmingua's appeal, but the Court nonetheless decided those appeals before Exmingua's and within significantly shorter time frames than in Exmingua's case.[780]

246. Specifically, in the *Oxec* case, the Constitutional Court took *less than five months* to render its 26 May 2017 decision on Oxec's appeal of the 4 January 2017 decision of the Supreme Court.[781] In the *Minera San Rafael* case, the Constitutional Court took *less than one year* to render its 3 September 2018 decision on Minera San Rafael's appeal of the 8 September 2017 decision of the Supreme Court.[782] And in the *CGN* case, the Constitutional Court took *less than 16 months* to render its 18 June 2020 decision on CGN's appeal of the 9 January 2019 decision of the Supreme Court.[783] In Exmingua's case, however, the Constitutional Court took just shy of *four years* to render its 11 June 2020 decision on Exmingua's appeal of the decision of 28 June 2016 of the Supreme Court.[784]

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[777] *Id.* ¶¶ 70, 413-414.

[778] Richter ¶ 137.

[779] Fuentes II ¶ 158.

[780] Clms' Mem. ¶¶ 292-293; Fuentes I ¶¶ 159-162; Appeal by Exmingua dated 30 June 2016 of the Supreme Court's 28 June 2016 decision granting an *amparo definitivo* in Case No. 1592-2014 (C-0475).

[781] *See* Constitutional Court of Guatemala, Consolidated Cases Nos. 90-2017, 91-2017, and 92-2017, Decision dated 26 May 2017, at 1, 111 (C-0441) (dismissing Oxec's appeal of the Supreme Court's decision of 4 Jan. 2017); *see also* Clms' Mem. ¶¶ 104-110.

[782] *See* Constitutional Court of Guatemala, Case No. 4785-2017, Decision dated 3 Sept. 2018, at 1, 542 [at 1, 29 ENG] (C-0459) (dismissing Minera San Rafael's appeal of the Supreme Court's decision of 8 Sept. 2017); Appeal by Minera San Rafael dated 26 Sept. 2017 of the Supreme Court's decision granting an *amparo definitivo* in Case No. 1076-2017 (C-0573); *see also* Clms' Mem. ¶¶ 111-114.

[783] *See* Constitutional Court of Guatemala, Case No. 697-2019, Decision dated 18 June 2020, at 1, 266 (C-0496) (partially dismissing CGN's appeal of the Supreme Court's decision of 9 Jan. 2019); *see also* Clms' Mem. ¶ 115.

[784] *See* Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision dated 11 June 2020, at 1, 84-85 [at 1, 42 ENG] (C-0145) (dismissing Exmingua's appeal of the Supreme Court's decision of 28 June 2016); *see also* Appeal by Exmingua dated 30 June 2016 of the Supreme Court's 28 June 2016 decision granting an *amparo definitivo* in Case No. 1592-2014 (C-0475).

247. Guatemala asserts that the reason the Constitutional Court gave priority to the *Minera San Rafael* case was that "two communities with opposing interests, one in favour of the mining activity and the other against it, set up camp in front of the building of the Constitutional Court, exerting social pressure and sometimes physical and psychological violence."[785] Guatemala further asserts that this "complicat[ed]" other cases in which the same judge (Judge Bonerge Amilca Mejia Orellana) also served as the *rapporteur*, including Exmingua's case.[786] If protests and violence in front of the courthouse indeed motivated the Court to give priority to the *Minera San Rafael* case, then this raises serious questions as to the independence of the Constitutional Court's judges and Guatemala's lack of resolve to protect its judges against undue outside pressure. Moreover, given that the *Minera San Rafael* case and Exmingua's case involved the same procedural and substantive issues, the fact that the same judge served as *rapporteur* on both cases should have expedited Exmingua's case as well, rather than "complicate" it.[787] This is especially true if, as Guatemala asserts, "the Constitutional Court maintained the same position" "in all subsequent decisions on mining and consultations with indigenous peoples" since its decision of 5 May 2016 affirming the *amparo provisional* granted by the Supreme Court on 11 November 2015 in the case filed by CALAS concerning Exmingua's rights.[788]

248. The above confirms that the Constitutional Court's four-year delay in issuing a decision in Exmingua's appeal was unjustified and excessive.

b. Guatemala's Courts Blatantly Violated Exmingua's Substantive Acquired Rights

249. As demonstrated in Claimants' Memorial, supported by Professor Fuentes' expert opinion, the Guatemalan court proceedings concerning Exmingua's exploitation license for Progreso VII also were marred by blatant violations of Exmingua's substantive acquired rights, in violation of the principles of legal certainty, proportionality, equality before the law, and due process of law, as well as the right to property and the freedom of trade and industry.[789]

250. In response, Guatemala in its Counter-Memorial engages in a lengthy discussion of how ILO Convention 169 is part of Guatemalan law, how "Guatemalan authorities and courts are obliged to interpret and apply the law in accordance with the jurisprudence of the Inter-American Court of

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[785] Resp's C-M ¶ 71.
[786] *Id.* ¶ 71.
[787] *See Id.* C-M ¶ 71.
[788] *Id.* ¶ 74.
[789] Clms' Mem. ¶¶ 140, 296-305; Fuentes I ¶¶ 163-184; *see also* Fuentes II ¶¶ 160-162.

Human Rights," and how "[t]he Constitutional Court has recognized the existence and obligatory nature of the right to prior consultation."[790] This discussion is irrelevant, while Guatemala fails to address the relevant points made in Claimants' Memorial with the support of Professor Fuentes, as summarized briefly below.

251. *First*, years after granting Exmingua the Progreso VII exploitation license in 2011, in compliance with Guatemalan law as it existed and was being applied by Guatemala at the time, Guatemala "changed all the rules of the game" by retroactively requiring a new consultation process and indefinitely suspending the license.[791] Specifically, Exmingua in 2010 and 2011 complied with all then-existing requirements under Guatemalan law in applying for and obtaining the Progreso VII exploitation license.[792] This included preparing the EIA, which contained, among other things, social studies entailing a public participation process, which the MARN reviewed and approved.[793]

252. Indeed, between 2008 and 2015, Guatemala publicly and officially took the position that, in the absence of any regulation specifically implementing the consultation process under ILO Convention 169, the public participation process under the Mining Law and the Environmental Assessment, Control and Monitoring Regulations satisfied the consultation requirement under ILO Convention 169.[794] In the same year that Exmingua was granted its exploitation license, in 2011, the

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[790] Resp's C-M ¶¶ 79-118.

[791] Clms' Mem. ¶¶ 297-300; Fuentes I ¶¶ 165-170.

[792] Clms' Mem. ¶¶ 29-39, 297; Fuentes I ¶¶ 9-22.

[793] Clms' Mem. ¶¶ 29-37, 297; Fuentes I ¶¶ 10-19.

[794] Clms' Mem. ¶ 297; Fuentes I ¶ 52; *see also* International Labor Conference, 99th Session, 2010, Report of the Committee of Experts on the Application of the Conventions and Recommendations (Report III, Part 1A), at 884 [at 768 ENG] (CL-0281) (reflecting the position set forth by Guatemala, represented by the MEM, in 2008 as follows: "[T]hat it is impossible for it to hold consultations in accordance with the Convention due to the absence of specific regulations on this subject. It adds that, in view of the absence of such provisions, the Ministry has to comply with the Mining Act that is currently in force, which establishes a series of requirements that have to be met by the party concerned to obtain a mining permit and, once they have been fulfilled, requires the administration to grant the permit without giving it any option to do otherwise. It further notes that the Ministry urged those interested in obtaining permits to approach the indigenous communities and inform them fully concerning their projects. The Committee notes that, according to the Government's report, a forum for dialogue was established for the Government and the representatives of the communities concerned with a view to assessing the situation."); Inter-American Commission of Human Rights, Petition 1566-07, *Communities of the Sipakepense and Mam Mayan People of the Municipalities of Sipacapa and San Miguel Ixtahuacán v. Guatemala*, Admissibility Report No. 20/14 dated 3 Apr. 2014 ¶ 19 (CL-0225) (reflecting the position set forth by Guatemala on 13 November 2010 as follows: "[U]nder domestic law, it is incumbent on the entity interested in securing a mining right to present the EIA conducted by consultants certified by the MARN and based on the terms of reference prepared by said ministry. It affirms that, once the results of the EIA were obtained, it issued public announcements through edicts in the Spanish and Mam languages. It points out that, although any party concerned could object, neither the petitioners nor anyone else did so. As for the consultation process, it contends that 'the right of the indigenous people to be consulted is unquestionable,' in accordance with the treaties ratified by Guatemala and the jurisprudence of the Constitutional Court. It notes that, accordingly, *the MARN informed the company that it was mandatory to conduct a public participation process, in keeping with Article 74 of the Regulations on Environmental Assessment, Control, and Monitoring (Government Agreement 431-2007), which was carried out in full. It points out that, although it is not called a 'consultation,' 'it is indeed a prior process' in which 'notification was given that a mining project would be executed*.'") (emphasis added); Inter-American Commission on Human Rights, Petition 1118-11,

Constitutional Court also confirmed that, until such time as the legislature enacted a law specifically regulating consultations with indigenous peoples, it was sufficient for such consultations to be conducted under existing legislation.[795] Against this background, it was inconsistent with the principles of legal certainty and the rule of law for the Courts years later to require yet another consultation process while suspending the license, which had been validly granted in accordance with the pre-existing laws and regulations and, thereby, in the words of Professor Fuentes, "chang[ing] all the rules of the game."[796]

253. *Second*, by indefinitely suspending Exmingua's license, and thereby wrongfully burdening Exmingua with the severe consequences of Guatemala's own purported failure to implement its international obligations, Guatemala also violated the Constitutional principle of proportionality, because it could have conducted the consultations without suspending the license, as it did in other cases, in particular in the *Oxec* case.[797] Indeed, in the *Minera San Rafael* case, Supreme Court Judge Valdés Quezada in her dissenting opinion applied the principle of proportionality to conclude that it was neither adequate nor necessary to suspend the mining operations in order for or while the MEM conducted the consultations.[798] Similarly, in the *CGN* case, Constitutional Court Judge Ochoa Escribá, in her concurring opinion, expressed her disagreement with the continued suspension of operations in that case, as it was contrary to the holding of the Constitutional Court in *Oxec*.[799]

254. As in *Oxec*, the MEM's conducting consultations did not require the suspension of Exmingua's mining operations, as Professor Fuentes explains, especially given that Exmingua already had conducted consultations in the context of the social studies required for the EIA.[800] The Constitutional Court, however, explicitly upheld the continuing suspension pending completion of

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Maya Q'eqchi' Agua Caliente Community v. Guatemala, Admissibility Report No. 30-17 dated 18 Mar. 2017 ¶ 29 (CL-0282) (reflecting the position set forth by Guatemala on 7 May 2015 as follows: "With regard to prior consultation, the State maintains that Articles 15 of the Mining Act and 33 of the Regulations on Environmental Evaluation, Oversight, and Monitoring require the environmental impact study be made public prior to granting the exploitation license, and this was done. It indicates that '*although this is not the ideal consultation mechanism, according to the [ILO] Convention it does constitute a mechanism for providing prior information* so anyone can oppose it should they feel it necessary.' The State argues that the CGN complied with the requirements to grant the license.") (emphasis added); Fuentes II ¶¶ 73-77.

[795] Fuentes II ¶ 78 (citing Constitutional Court of Guatemala, Case No. 1072-2011, Decision dated 24 Nov. 2011, at 10 [at 10 ENG] (C-0659).

[796] Fuentes ¶ 168; Clms' Mem. ¶ 297

[797] Clms' Mem. ¶¶ 301-305; Fuentes I ¶¶ 171-184; Constitutional Court of Guatemala, Consolidated Cases Nos. 90-2017, 91-2017, and 92-2017, Decision dated 26 May 2017, at 101 (C-0441); *see also Amparo* Law, Art. 49 (C-0416) (allowing for an order revoking the measure at issue).

[798] Supreme Court of Guatemala, Case No. 1076-2017, Dissenting Opinion by Judge Silvia Patricia Valdés Quezada, Decision dated 27 July 2017, at 2-3 (C-0498) (*San Rafael* case).

[799] Constitutional Court of Guatemala, Case No. 697-2019, Concurring Opinion by Judge Dina Josefina Ochoa Escribá in the Decision dated 18 June 2020, at 1 (C-0496); *see also* Fuentes I ¶ 180.

[800] Fuentes I ¶ 178.

MEM-led consultations, and furthermore indefinitely extended the suspension until such time as a determination is made that the license does not threaten the existence of the indigenous populations in the surrounding area.[801]

255. As Constitutional Court Judge Araujo Bohr confirmed in her concurring opinion in the 11 June 2020 decision regarding Exmingua, the right to consultations under ILO Convention 169 "does not imply a right to veto nor is the result of the consultations necessarily the reaching of agreement or consent."[802] She noted that her colleagues on the Court failed to appreciate this, "who, in deciding to suspend the mining exploitation activities throughout the term of the consultation process, affected the rights to property, freedom of industry and freedom to commerce of Progreso VII."[803] Indeed, if having the MEM conduct additional consultations served such an important public purpose so as to disproportionally affect Exmingua's acquired rights, the MEM should have commenced and completed such consultations years ago – when the Courts first ordered it to do so, and as it did in the *Oxec* case. That it has not done so further confirms the disproportionate nature of the Court's ruling.

256. In a further attempt to distract from its violations of Exmingua's substantive acquired rights, Guatemala asserts in two sentences and without reference to any legal authority that Exmingua did not have any acquired right based on the grant of its Progreso VII exploitation license because "the concept of legitimate confidence or expectation is not recognized in Guatemalan law."[804] The Richter Opinion makes a similarly general assertion, also without offering any legal authority in support.[805] As Professor Fuentes notes, Professor Richter fails to engage with the detailed explanation provided in his First Opinion of the concept and its Constitutional underpinnings, including the "five decisions of the Constitutional Court acknowledging the principle of legitimate confidence not only as part of Guatemalan law, but as a fundamental manifestation of the Constitutional Rule of Law in Guatemala."[806] For the avoidance of any doubt in this regard, Professor Fuentes expands on his explanation in his Second Opinion, concluding:

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[801] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision dated 11 June 2020, at 77, 87 [at 38-39, 43 ENG] (C-0145); Fuentes I ¶ 177.

[802] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Concurring Opinion by Judge Maria de los Angeles Araujo Bohr in Decision dated 11 June 2020, at 94 [at 48 ENG] (C-0145); *see also* Fuentes I ¶ 181.

[803] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Concurring Opinion by Judge Maria de los Angeles Araujo Bohr in Decision dated 11 June 2020, at 94 [at 48 ENG] (C-0145); *see also* Fuentes I ¶ 181.

[804] Resp's C-M ¶ 122.

[805] Richter ¶¶ 20, 59-60.

[806] Fuentes II ¶¶ 32-33; Fuentes I ¶¶ 37-48.

> The protection of legitimate confidence begins with respecting and preserving the rules of the game, as well as the word given in good faith and based on objectivity, truthfulness and decency, which is the basis of the principle of '*pacta sunt servanda*' (what is agreed must be complied with). In addition, the protection of legitimate confidence is inherent in the full observance and exercise of the rights of legal certainty, equality before the law, defense, due process and effective judicial protection, as set forth in Articles 2, 4, 12, and 203(1) of the Constitution.[807]

257. Inasmuch as Claimants complain in this Arbitration about Guatemala's violations of Exmingua's acquired rights, it is shocking to see Guatemala's legal defense brazenly disavow fundamental Rule of Law principles that are clearly recognized in its own Constitution.

c. Guatemala's Courts Discriminated Against Exmingua

258. As demonstrated in Claimants' Memorial, supported by Professor Fuentes' expert opinion, Guatemala's courts discriminated against Exmingua by treating it less favourably than comparable Guatemalan-owned and foreign-owned companies, in particular, Oxec, S.A. and Oxec II, S.A ("Oxec"), Minera San Rafael, S.A. ("Minera San Rafael"), and Compañía Guatemalteca de Niquel ("CGN"), by rendering rulings before Exmingua's (as described above) and by allowing them to continue operating while social consultations were being conducted.[808]

259. As demonstrated in Claimants' Memorial, supported by Professor Fuentes' expert opinion, Guatemala's courts discriminated against Exmingua by treating it less favourably than comparable Guatemalan-owned and foreign-owned companies, in particular, Oxec, Minera San Rafael, and CGN, by rendering rulings before Exmingua's (as described above) and by allowing them to continue operating while social consultations were being conducted.[809]

260. Specifically, the Constitutional Court allowed Oxec to continue operating while the MEM conducted consultations, but insisted on upholding the suspension of Exmingua even when Exmingua sought reconsideration in light of the *Oxec* decision.[810]

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[807] Fuentes II ¶ 50.

[808] Clms' Mem. ¶¶ 306-311; Fuentes I ¶¶ 159-162, 177-178, 183; Fuentes II ¶ 159. Oxec is directly/legally-owned by Energy Resources Capital Corp, a Panamanian investor and indirectly/beneficially-owned by a Guatemalan investor, while Minera San Rafael is owned by Pan American Silver Corp ("PSA"), and CGN is owned by Soloway Investment Group, GmbH ("Soloway"), respectively Canadian and Swiss investors. See infra §§ III.A.3.a, F.

[809] Clms' Mem. ¶¶ 306-311; Fuentes I ¶¶ 159-162, 177-178, 183; Fuentes II ¶ 159.

[810] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Ruling denying Exmingua's request for reconsideration of the *amparo*, dated 5 Oct. 2017 (C-0563).

261. In its Counter-Memorial, Guatemala asserts that Oxec and Exmingua are not comparable, because the Oxec projects consist of hydroelectric plants, which are governed by the regulations applicable to the energy sector, rather than those applicable to the mining sector.[811] Guatemala further asserts that, unlike mining, power generation is an essential mission of the State.[812] Guatemala also asserts that Oxec "is actually comparable to other hydroelectric projects that started operations and were later subject to constitutionality control . . . [which] were not subject to suspension . . . ."[813] As a factual matter, Guatemala asserts, Oxec was "less socially conflictive" than Exmingua.[814]

262. None of these distinctions is relevant, however. In both cases, the key facts are the same: the MEM had previously granted licenses in accordance with existing legislation and regulations, and the validity of those licenses was challenged after the fact on the ground that the MEM had not conducted consultations under ILO Convention 169. Indeed, Guatemala concedes that it has been treating Oxec and other hydroelectric projects preferentially over mining projects, but fails to explain how consultations require suspension in the latter cases, but not the former. Guatemala's argument begs the question of why consultations cannot be held while operations continue in mining projects, while apparently they can be held while operations continue in hydroelectric projects. Guatemala's argument also is contradicted by the Constitutional Court's decision in *Cementos Progreso*, a case involving a mining project, where the Court ordered consultations under ILO Convention 169 to proceed but did not order suspension of the project's operations.[815]

263. Guatemala's further argument that power generation, unlike mining, is an essential mission of the State is illogical, because Claimants' are not challenging the lack of suspension in the *Oxec* case. To the contrary, it is Claimants' argument that, as in Oxec's case, suspension was neither necessary nor appropriate in Exmingua's case, as already set out above.[816] As Professor Fuentes explained, the courts "did not need to suspend Exmingua's operations in order for the allegedly pending public consultations to be implemented, especially considering that Exmingua had already performed consultations in connection with the social studies for its EIA, which served as the basis for the approval of its exploration license."[817] As it is, Exmingua's license has been suspended for more than five years, and the MEM has not even begun the consultations for Exmingua, although it commenced

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[811] Resp's C-M ¶ 134.
[812] *Id.* ¶ 135.
[813] *Id.* ¶ 136 (referring to the cases of *Corrientes del Rio*, *La Vega I*, *La Vega II*, and *RENACE*).
[814] *Id.* ¶ 137.
[815] Constitutional Court of Guatemala, Case No. 3878-2007, Decision dated 21 Dec. 2009, at 1-2, 37 (C-0497).
[816] *See supra* § II.D.1.b.
[817] Fuentes I ¶ 178; Clms' Mem. ¶ 303.

and completed consultations for Oxec within a seven-month period.[818] If avoiding social unrest were truly Guatemala's priority, one would expect it to conduct the consultations as quickly as possible.

264. As demonstrated in Claimants' Memorial and discussed above, the Constitutional Court's delay of almost four years in issuing its decision on Exmingua's appeal was not only excessive but also discriminatory, because the Court continued to rule much more expeditiously on appeals in other cases that raised the same legal issues but were filed later than Exmingua's.[819] This fact alone is a clear indicator that the excessive delay in Exmingua's case was arbitrary and driven by nationality bias as well as political interference.[820] Indeed, as Professor Fuentes points out, "under Article 77(a) of the *Amparo, Habeas Corpus* and Constitutionality Law, such a delay is presumed to be malicious, and evidence is required to show that it is not malicious."[821] As demonstrated above, Guatemala does not come anywhere near to overcoming this presumption.[822]

265. Having had its exploitation license suspended for more than five years, Exmingua faces continued uncertainty and impairment, as the 11 June 2020 decision of the Constitutional Court not only upheld the suspension indefinitely, but also imposed on Exmingua a new, additional, and onerous requirement that must be fulfilled even after the MEM has completed consultations.[823] Specifically, the Court held that Exmingua could only resume its operations after the MEM had completed the consultations *and* "provided the development of the project authorized by means of the 'Progreso VII Derivada' license is found not to threaten the existence of the indigenous peoples living within its area of influence," as already detailed above.[824]

266. As Professor Fuentes explained in his First Opinion, this means that the Court ordered two conditions to be met before Exmingua may resume operations under its Progreso VII license: not only must the MEM hold and complete consultations, but additionally "there must be reliable evidence that the Progreso VII Derivada mining exploitation license does not threaten the existence of the indigenous population settled in the area of influence of the mentioned project."[825] As Professor

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[818] Clms' Mem. ¶ 191; Memorandum of Final Report of Public Consultations by the MEM dated 11 Dec. 2017 (C-0561); Maria Rosa Bolaños, "MEM completes consultations with 11 communities for Oxec case," *La Prensa Libre* (C-0562).

[819] Clms' Mem. ¶¶ 133, 139; *see also supra* § II.D.1.a.vi; Fuentes I ¶¶ 159-162; Fuentes II ¶ 159.

[820] Clms' Mem. ¶ 133.

[821] Fuentes II ¶ 159; *Amparo* Law, Art. 77(a) (C-0416).

[822] *See supra* § II.D.1.a.vi.

[823] Clms' Mem. ¶ 141.

[824] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision dated 11 June 2020, at 87 [at 43 ENG] (C-0145); *see supra* § II.D.1.

[825] Fuentes I ¶ 177; Clms' Mem. ¶¶ 141, 310.

Fuentes further explained, this "could demand any amount of research, studies and opinions. All of this could delay the resumption of mining activities indefinitely, to the detriment, of course, of the acquired rights of Exmingua."[826] As Professor Fuentes pointed out, the Constitutional Court has imposed no such additional condition precedent in the *Oxec*, *Minera San Rafael* or *CGN* case.[827]

267. Additionally, in its decision ordering the continued suspension of *Minera San Rafael's* Escobal exploitation license during the consultation period, the Constitutional Court expressly ordered the MEM to carry out the consultation process "immediately," explaining that "[t]he immediacy of the consultation is ordered so that the mining company's activities are resumed as soon as possible."[828] In its 11 June 2020 decision concerning Exmingua's exploitation license, the Constitutional Court expressed no such urgency or concern to allow the resumption of operations "as soon as possible."

268. In its Counter-Memorial, Guatemala simply denies that any more onerous conditions were imposed on Exmingua, asserting generally that the Constitutional Court's jurisprudence on the subject of the right to consultations has been consistent since 2009, but fails to engage with the Constitutional Court's actual ruling or Claimants' observations in this regard.[829]

2. After Defending Its Issuance Of The License, The MEM Reversed Course And Suspended Exmingua's Exploitation License And Exportation Certificate

269. As Claimants explained in their Memorial, the MEM initially did not issue an order suspending Exmingua's license after the Supreme Court's ruling on 11 November 2015 granting CALAS the *amparo provisional*, and instead asserted that the Court's ruling "was groundless," as the exploitation license had been granted almost four years earlier, in 2011, and had not been challenged at that time.[830] In addition, Claimants explained that the MEM – responding to a request from the Supreme Court dated 2 March 2016 to submit a report on the steps taken to comply with the *amparo*

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[826] Fuentes I ¶ 177; Clms' Mem. ¶¶ 141, 311.

[827] Fuentes I ¶ 177; Clms' Mem. ¶¶ 141, 311; *see also* Constitutional Court of Guatemala, Consolidated Cases Nos. 90-2017, 91-2017 and 92-2017, Decision dated 26 May 2017, at 101 [at 4 ENG] (C-0441) (ordering the MEM to conduct consultations under ILO Convention 169 within 12 months, and allowing the operations of Oxec and Oxec II to continue during that period of time); Constitutional Court of Guatemala, Case No. 475-2017, Decision dated 3 Sept. 2018, at 550 [at 33 ENG] (C-0459) (allowing Minera San Rafael to resume operations under its Escobal exploitation license upon the MEM's completion of consultations under ILO Convention 169 and the issuance of resolutions giving effect to the outcome of the consultations); Constitutional Court of Guatemala, Case No. 697-2019, Decision dated 18 June 2020, at 268, 274 [at 3-4 ENG] (C-0496) (ordering the MEM to conduct consultations under ILO Convention 169 within 18 months and the continued suspension of CGN's exploitation license pending such suspension).

[828] Constitutional Court of Guatemala, Case No. 475-2017, Decision dated 3 Sept. 2018, at 545-546 [at 31 ENG] (C-0459).

[829] *See* Resp's C-M ¶¶ 129-138.

[830] Clms' Mem. ¶ 97.

provisional – asserted that it was "impossible" to comply with the ruling, because the MEM had already granted a license to Exmingua.[831]

270. However, as Claimants further explained, the MEM subsequently reversed course and, on 10 March 2016, issued Resolution No. 1202 suspending Exmingua's right to exploit gold and to sell locally or transform any such material.[832] Claimants also explained that, on 3 May 2016, the MEM issued Resolution No. 146, suspending Exmingua's Certificate of Exportation, despite the fact that it was valid until 23 October 2016, was subject to automatic, annual extensions, and the Supreme Court's *amparo provisional* did not concern Exmingua's exporting activities.[833]

271. In its Counter-Memorial, Guatemala *entirely fails to address* the MEM's *volte-face* in respect of the Supreme Court's 11 November 2015 ruling, merely asserting instead that the MEM's suspension of Exmingua's Progreso VII exploitation license "was done in compliance with" the Supreme Court's ruling.[834] In addition, Guatemala baldly asserts – in a subsection of just four sentences and wholly lacking in support – that the MEM's suspension of Exmingua's exportation license was "temporary and reasonable."[835] In this regard, Guatemala contends that Claimants "make[] no effort to substantiate [their] claim" that the exportation license was improperly suspended and that, in any event, "[a]ny legal error . . . was rectified" by the MEM's subsequent revocation of Resolution No. 146.[836] However, as demonstrated below, Guatemala's failure to engage with the MEM's reversal of its position does little to obscure the import of this point; namely, that the MEM understood that the Supreme Court's suspension order was arbitrary, but nonetheless proceeded to suspend Exmingua's exploitation license. In addition, Guatemala's assertions regarding Resolution No. 146 are incorrect.

272. *First*, Guatemala has failed to address the MEM's position that the Supreme Court's 11 November 2015 ruling "was groundless" and that it was "impossible" to comply with the ruling, or the MEM's abrupt reversal of this position and issuance of Resolution No. 1202.[837] Guatemala's silence underscores the arbitrary nature of the MEM's reversal.

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[831] *Id.*

[832] *Id.* ¶ 98.

[833] *Id.* ¶ 99.

[834] Resp's C-M ¶ 543.

[835] *Id.* ¶ 349.

[836] *Id.*

[837] Maria Rosa Bolaños, "The MEM will not suspend the project," *La Prensa Libre* dated 1 Mar. 2016, at 1 (C-0006); Supreme Court of Justice of Guatemala, Case No. 1592-2014, MEM submission in relation to compliance with *amparo*

273. Indeed, the MEM repeatedly expressed its disagreement with the Supreme Court's ruling. On 1 March 2016, the Director of the MEM's Legal Assistance Unit, Mr. Zarceño, remarked in an interview that the *amparo* was groundless, because "it was filed in 2014 seeking the suspension of the granting of the license, but such license had been already granted in 2011," and thus the *amparo* was not filed within the statutorily-required 30 days.[838] Mr. Zarceño further observed that "[t]he Supreme Court [] ordered us to suspend the granting, but if the license was already granted . . . there is nothing else we can do."[839] In addition, on 10 March 2016, the MEM observed – in a formal submission to the Supreme Court – that "[t]he grant of the *amparo provisional* is not consistent with the administrative proceedings," "the *amparo* [is] meritless," and "compliance [with it is] impossible."[840] The MEM also stated that "such an order is impossible to perform, [] due to the amount of time elapsed since the license was granted . . . ."[841]

274. Yet, *the same day* that the MEM made this submission to the Supreme Court, noting that compliance with the 11 November 2015 ruling was "impossible," and less than ten days after the MEM Legal Assistance Director's interview, in which he stated that the ruling "was groundless," the MEM issued Resolution No. 1201 suspending Exmingua's exploitation license.[842] That Guatemala has produced no relevant documents responsive to Claimants' request for "documents relied upon and communications exchanged by any MEM personnel [regarding] [the MEM] changing its position to issue Resolution No. 1202" is unsurprising – there was no time for such documents to be created. Indeed, the only reasonable inference is that the MEM did *not* change its view that the Court's ruling was "groundless" and contravened established principles and jurisprudence, but nonetheless issued the suspension order.

275. Notably, the MEM's abrupt reversal followed a week of protests by anti-mining activists in front of the MEM's offices in Guatemala City.[843] On 3 March 2016, these activists – led by representatives from *CALAS* and Milton Carrera (who, as noted above, was involved in the attack on Mr. Gálvez) – established a permanent camp in front of the building, blocked the entrance, and

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provisional, 10 Mar. 2016, at 2 (C-0008); *see also* Natiana Gándara, "CIG urges the MEM to not bend over pressure," *La Prensa Libre* dated 11 Mar. 2016 (C-0007).

[838] Maria Rosa Bolaños, "The MEM will not suspend the project," *La Prensa Libre* dated 1 Mar. 2016, at 1 (C-0006).

[839] *Id.* at 2.

[840] Supreme Court of Guatemala, Case No. 1592-2014, Ministry of Energy and Mines' submission in relation to compliance with amparo provisional, 10 Mar. 2016, at 2 (C-0008).

[841] *Id.* at 3 (C-0008).

[842] Clms' Mem. ¶ 98; MEM Resolution No. 1202 dated 10 Mar. 2016 (C-0139).

[843] MEM Resolution No. 1202 dated 10 Mar. 2016 (C-0139).

demanded that Minister Juan Pelayo Castañon issue an order suspending Exmingua's license.[844] The activists also burned Minister Castañon in effigy and threatened to "*block the entire capital*" if their demand to suspend Exmingua's mining license was not met.[845]

276. *Second*, the MEM's suspension of Exmingua's exportation license was not "reasonable" or "temporary,"[846] and Guatemala's assertion that Claimants "make[] no effort [in their Memorial] to substantiate [the] claim" that the "MEM arbitrarily suspended [the] Progresso VII exportation license"[847] also is wrong. Contrary to Guatemala's assertions, the Supreme Court's *amparo provisional* had no connection to Exmingua's exportation activities and there was no legal basis for the MEM to suspend Exmingua's exportation license, as Claimants explained and Professor Fuentes confirmed.[848] In fact, Resolution No. 146 fails to explain any relationship between it and the Supreme Court's 11 November 2015 ruling.[849] Resolution No. 146 states only that "WHEREAS, via its Order of November 11, 2015 . . . the Supreme Court [] . . . ordered this Ministry to suspend the *exploitation license*" and "WHEREAS . . . Resolution No. 1202 . . . suspended the exclusive right *to exploit* the gold and silver mining products, as well as the right to dispose of such products obtained under said right for *local sale* . . .," the MEM "DECLARES . . . [the] Export License . . . to be [] SUSPENDED."[850] Thus, notwithstanding the MEM's acknowledgement that the Supreme Court's order pertained only to the exploitation license and to Exmingua's right to sell its products *locally*, the MEM nonetheless suspended Exmingua's exportation license.

277. In addition, although Exmingua requested that the MEM revoke Resolution No. 146 three days after it was issued, the MEM failed to act for more than five months.[851] It was not until 24 October 2016 – *one day after Exmingua's Certificate of Exportation had expired* – that the MEM revoked the Resolution.[852] The MEM thus clearly had no intention of revoking Resolution No. 146 while Exmingua's exportation license remained valid. Exmingua, moreover, had no ability to obtain

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[844] Joel Suncar, "Manifestantes de la Puya toman la diagonal 17 frente al MEM," *La Prensa Libre* dated 4 Mar. 2016 (C-0874); Geovani Contreras, "Locals from La Puya continue with the protests," *La Prensa Libre* dated 13 Mar. 2016 (C-0009).

[845] Joel Suncar, "Manifestantes de la Puya toman la diagonal 17 frente al MEM," *La Prensa Libre* dated 4 Mar. 2016 (C-0874); Jerson Ramos and Jose Rosales, "Protesters of La Puya burn doll of the Minister of Energy," *La Prensa Libre* dated 26 Mar. 2016 (C-0010).

[846] Resp's C-M ¶ 349.

[847] *Id.*

[848] *See, e.g.*, Clms' Mem. ¶¶ 99, 221, 231-232; Fuentes I ¶ 54.

[849] MEM Resolution No. 146 dated 3 May 2016 (C-0140); MEM Resolution No. 5194 dated 24 Oct. 2016 (C-0142-SPA/ENG); Clms' Mem. ¶ 99.

[850] MEM Resolution No. 146 dated 3 May 2016 (C-0140) (emphases added).

[851] MEM Resolution No. 5194 dated 24 Oct. 2016 (C-0142).

[852] MEM Resolution No. 5194 dated 24 Oct. 2016 (C-0142); Exportation license dated 25 Sept. 2015 (C-0911).

renewal of its exportation license while its exploitation license remained suspended. The MEM thus deprived Exmingua of the ability to export concentrate that it had mined and processed, and which was awaiting shipment, under its pre-existing exportation permit, with no ability to have that permit renewed post-expiration. Resolution No. 146 thus was not a reasonable or temporary suspension.

278. *Third*, the MEM's legal error was not "rectified" by the MEM's revocation of Resolution No. 146.[853] To the contrary, as the timing of the MEM's revocation of Resolution No. 146 reveals, it was delayed *precisely* to prevent Exmingua from continuing to export its product, which Exmingua has been unable to do since Resolution No. 146 was issued. Guatemala's assertion that "any legal error that Claimants allege has been made by [the] MEM in revoking its license was rectified by t[he] revocation of Resolution No. 146" thus is wide off the mark.

3. Guatemala *De Facto* Suspended Exmingua's Santa Margarita Exploration License And Precluded Exmingua From Securing An Exploitation License

279. As Claimants explained in their Memorial, Guatemala's actions with respect to Exmingua's Progreso VII exploitation license had severe repercussions for Exmingua's rights under its Santa Margarita exploration license and its pending application for the Santa Margarita exploitation license.[854] In particular, Claimants explained that the *de jure* indefinite suspension of Exmingua's Progreso VII exploitation license had the *de facto* effect of indefinitely suspending Exmingua's Santa Margarita exploration license.[855] This is because no investor would conduct exploration work and the market will assign no value to an exploration license unless that investor has legitimate confidence that it will obtain an exploitation license if it proves an economically viable deposit. Accordingly, as Claimants further explained, the Courts' rulings indefinitely suspending Exmingua's Progreso VII exploitation license, and precluding Exmingua from mining until the MEM conducts and completes consultations, deprived Exmingua's Santa Margarita exploration license of all value, as it would have been unreasonable for any investor to conduct exploration or for anyone to assign value to that exploration license when there was no longer any prospect of obtaining an exploitation license.[856]

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[853] Resp's C-M ¶ 349.

[854] Clms' Mem. ¶ 116; Conditional Assignment of Mining Rights dated 21 Nov. 2000 (C-0041); Extension of the Conditional Assignment of Mining Rights dated 4 Oct. 2001 (C-0042); Official Communication No. 016 issued by the MEM dated 1 Feb. 2005 (C-0043); Decision to extend the area of the Santa Margarita Licence dated 22 Feb. 2008 (C-0044); Exploitation license application form for Santa Margarita dated 19 Jan. 2009 (C-0070).

[855] Clms' Mem. ¶¶ 116-124; Kappes I ¶¶ 141-143.

[856] Clms' Mem. ¶ 124.

This result, Claimants explained, comported with Guatemala's *de facto* moratorium on granting new exploration or exploitation licenses.[857]

280. Claimants also explained that, although Exmingua had filed an *amparo* action seeking the State's assistance in ensuring Exmingua's access to its mining site, the MEM nonetheless issued Resolution No. 4056 on 21 December 2016, directing Exmingua to file the EIA for the Santa Margarita license within 30 days.[858] As Claimants further explained, on 22 March 2017, Exmingua notified the MEM that it had not been possible to conclude the Santa Margarita EIA because access to the area was blocked and consultations for the EIA social studies could not be conducted due to threats by protesters.[859] Exmingua thus requested the MEM to suspend the requirement to submit an EIA until "there no longer is an impediment resulting in a physical and material impossibility to comply."[860] The MEM did not respond to this request and, on 7 April 2017, Exmingua submitted its EIA for Santa Margarita to the MARN without the section on the social studies.[861]

281. Thereafter, as Claimants also explained, the MEM denied Exmingua's request and again directed Exmingua to file the EIA for Santa Margarita within 30 days.[862] Exmingua filed an administrative appeal against this decision – observing that Guatemala's mining laws do not permit the MEM to impose a 30-day deadline for submission of an approved EIA – but this appeal was rejected.[863] Claimants further explained that, on 7 November 2017, Exmingua again wrote informing the MEM that it was still unable to complete the consultations because of the blockade, and repeated its request for a suspension of this EIA requirement until the impediment ceased.[864] In addition, Claimants explained that the MEM nonetheless directed Exmingua to "regularize" its application for an exploitation license for Santa Margarita within 30 days, but that, due to the ongoing protests and threats, Exmingua was unable to comply with this request, which resulted in its license application being archived.[865]

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[857] Clms' Mem. ¶ 124; Kappes I ¶ 143.
[858] Clms' Mem. ¶ 119.
[859] *Id.* ¶ 120.
[860] *Id.*
[861] *Id.* ¶ 121.
[862] *Id.* ¶ 122
[863] *Id.*
[864] Clms' Mem. ¶ 122.
[865] *Id.* ¶ 123.

282. In its Counter-Memorial, Guatemala asserts that the Constitutional Court did not *de facto* suspend Exmingua's Santa Margarita exploration license.[866] In this regard, Guatemala contends that "the Constitutional Court's decision had no impact on Santa Margarita exploration or exploitation license,"[867] "[w]ithout any government-ordered suspension of Exmingua's exploration works, there exists no rhyme or reason for Exmingua to suspend its own operations."[868]

283. Guatemala also asserts in its Counter-Memorial that "[w]hile Claimants allege[] that the blockades in 2016 impeded their effort to perform consultation[s], there is no evidence which shows that such a blockade ever happened," and, in this regard, that "Claimants have failed to show how they were [] obstructed from conducting the social study needed for Santa Margarita."[869] Guatemala further asserts that Claimants "provide no explanation as to why the MEM's decision was arbitrary" and thus "plac[e] Guatemala in a situation where it is unable to engage with Claimants' submission."[870] In addition, Guatemala asserts that Claimants' requests to the MARN "demonstrate[] Exmingua's willingness . . . to fail to comply with Guatemalan law" because "clearly the MEM could not dispense [with the] requirement . . . of an EIA in order to grant the exploitation permit."[871] These assertions are baseless, as demonstrated below.

284. *First*, Guatemala's assertion that the Constitutional Court did not *de facto* suspend Exmingua's Santa Margarita exploration license is wrong. Following the Constitutional Court's *de jure* indefinite suspension of Exmingua's Progreso VII exploitation license, it would have been legally imprudent and economically unsound for Exmingua to continue exploration at the Santa Margarita site. Indeed, Guatemala's Constitutional Court has since ruled that *both* pre-existing exploration *and* exploitation licenses will be suspended absent State-led consultations.[872]

285. *Second,* Guatemala's assertions that there is no evidence that a blockade of the mine occurred in 2016 and that Claimants have failed to show that they were obstructed from conducting the social studies are incorrect. As Mr. Kappes explains, "a new wave of protests started in early 2016" that "vastly exceeded" the sporadic protests that occurred after the blockade was lifted in 2014 and before

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[866] Resp's C-M ¶ 362.

[867] *Id.* ¶ 363.

[868] *Id.* ¶ 527.

[869] *Id.* ¶¶ 241, 361, 457; *see also id.* ¶ 250 (asserting that "there is absolutely no evidence" that protests blocked access to the Project site in 2016).

[870] *Id.* ¶ 357.

[871] Resp's C-M ¶ 451.

[872] Constitutional Court Ruling, Case No. 4785-2017 dated 3 Sept. 2018 (C-0459).

the Courts' rulings.[873] In fact, the blockades during this period forced "Exmingua's employees . . . to enter the mine by foot using a five-kilometre trail from San José del Golfo, which was also used to deliver fuel and equipment to the plant."[874] Mr. Kappes further explains that the "new protests and blockades prevented [] consultants from accessing the site and surrounding areas to safely conduct consultations for the Santa Margarita EIA."[875]

286. In fact, as MadreSelva's protest notices to the Government reflect, these new protests occurred nearly *every day* – and 24 hours a day – from 21 January 2016 until at least 30 April 2018.[876] MadreSelva notified the Government on 18 January 2016 that "for the days 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, of January 2016, as of [] 00:00 hours" a protest will be held "in the Municipalities of San Jose del Golfo and San Pedro Ayampuc . . . to express [] opposition [to] . . . the Mining Project."[877] MadreSelva's letter dated 22 March 2018 similarly observed that for days "1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 . . . of April a protest will be held" "concluding on April 30, 2018 at 23 hours and 59 minutes."[878] Numerous such letters were sent to the Government in the intervening period.[879]

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[873] Kappes I ¶ 138; Kappes II ¶ 75; *see also* Clms' Mem. ¶ 117.

[874] Kappes II ¶ 75.

[875] *Id.*

[876] *See, e.g.*, Madre Selva's Notification of Protests dated 18 Jan. 2016 (C-0875); Madre Selva's Notification of Protests dated 8 Feb. 2016 (C-0876); Madre Selva's Notification of Protests dated 18 Feb. 2016 (C-0877); Madre Selva's Notification of Protests dated 26 Feb. 2016 (C-0878); Madre Selva's Notification of Protests dated 8 Mar. 2016 (C-0879); Madre Selva's Notification of Protests dated 18 Mar. 2016 (C-0881); Madre Selva's Notification of Protests dated 30 Mar. 2016 (C-0882); Madre Selva's Notification of Protests dated 8 Apr. 2016 (C-0883); Madre Selva's Notification of Protests dated 19 Apr. 2016 (C-0884); Madre Selva's Notification of Protests dated 28 Apr. 2016 (C-0885); Madre Selva's Notification of Protests dated 6 May 2016 (C-0886); Madre Selva's Notification of Protests dated 20 May 2016 (C-0887); Madre Selva's Notification of Protests dated 31 May 2016 (C-0888); Madre Selva's Notification of Protests dated 9 June 2016 (C-0889); Madre Selva's Notification of Protests dated 17 June 2016 (C-0890); Madre Selva's Notification of Protests dated 29 June 2016 (C-0927); Madre Selva's Notification of Protests dated 29 July 2016 (C-0891); Madre Selva's Notification of Protests dated 16 Aug. 2016 (C-0892); Madre Selva's Notification of Protests dated 29 Aug. 2016 (C-0928); Madre Selva's Notification of Protests dated 13 Sept. 2016 (C-0929); Madre Selva's Notification of Protests dated 28 Sept. 2016 (C-0893); Madre Selva's Notification of Protests dated 13 Oct. 2016 (C-0894); Madre Selva's Notification of Protests dated 3 Nov. 2016 (C-0895); Madre Selva's Notification of Protests dated 9 December 2016 (C-0930); Madre Selva's Notification of Protests dated 28 Feb. 2018 (C-0931); Madre Selva's Notification of Protests dated 22 Mar. 2018 (C-0896).

[877] Madre Selva's Notification of Protests dated 18 Jan. 2016 (C-0875).

[878] Madre Selva's Notification of Protests dated 22 Mar. 2018 (C-0896).

[879] Madre Selva's Notification of Protests dated 18 Jan. 2016 (C-0875); Madre Selva's Notification of Protests dated 8 Feb. 2016 (C-0876); Madre Selva's Notification of Protests dated 18 Feb. 2016 (C-0877); Madre Selva's Notification of Protests dated 26 Feb. 2016 (C-0878); Madre Selva's Notification of Protests dated 8 Mar. 2016 (C-0879); Madre Selva's Notification of Protests dated 18 Mar. 2016 (C-0881); Madre Selva's Notification of Protests dated 30 Mar. 2016 (C-0882); Madre Selva's Notification of Protests dated 8 Apr. 2016 (C-0883); Madre Selva's Notification of Protests dated 19 Apr. 2016 (C-0884); Madre Selva's Notification of Protests dated 28 Apr. 2016 (C-0885); Madre Selva's Notification of Protests dated 6 May 2016 (C-0886); Madre Selva's Notification of Protests dated 20 May 2016 (C-0887); Madre Selva's Notification of Protests dated 31 May 2016 (C-0888); Madre Selva's Notification of Protests dated 9 June 2016 (C-0889); Madre Selva's Notification of Protests dated 17 June 2016 (C-0890); Madre Selva's Notification of Protests dated 29 June 2016 (C-0927); Madre Selva's Notification of Protests dated 29 July 2016 (C-0891); Madre Selva's Notification of Protests

287. On 7 March 2016, CALAS similarly notified the Government that "demonstrations have been established as PERMANENT (24:00 a.m. and for an indefinite period) . . . [o]n the outskirts of the central building of the Ministry of Energy and Mines . . . [and in the] Municipality of San Pedro Ayampuc."[880] As CALAS observed, these demonstrations were established "to protest [and] demand that the Minister of Energy and Mines, abide by the [*amparo*] protection [from] the Supreme Court of Justice."[881]

288. As Exmingua explained to the MEM in March 2017, these protesters "made threats, which jeopardize[d] [its] personnel and the environmental managers," "access to the project area has been blocked,"[882] and its consultants "refuse to go there out of fear for their physical integrity."[883] That Exmingua's consultants were fearful, and thus unable to carry out the consultations, is warranted – these same protesters had previously held two of Exmingua's security guards hostage;[884] had "intercepted" when "all carrying [] machetes" two of Exmingua's workers "[as] they returned on foot to their homes after finishing their work day," "threatened [them] with a firearm," and "told them that if they passed through that place again, they would be physically eliminated, for being mining workers;"[885] and sent no less than *sixteen* people to the hospital with injuries, including "[s]kull [t]rauma," "[b]rain contusion[s]," "chest contusion," "face wounds," "blunt [trauma to the] left leg," and a "scalp [laceration]."[886] In addition, that same month, another element of these protesters – who also had threatened to "tie [] up and burn [Mr. Gálvez] alive" – constructed a life-size doll of the incumbent Minister of Energy and Mines (complete with dress shirt and tie) and set it alight, stoking the smouldering ashes with a stick.[887]

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dated 16 Aug. 2016 (C-0892); Madre Selva's Notification of Protests dated 29 Aug. 2016 (C-0928); Madre Selva's Notification of Protests dated 13 Sept. 2016 (C-0929); Madre Selva's Notification of Protests dated 28 Sept. 2016 (C-0893); Madre Selva's Notification of Protests dated 13 Oct. 2016 (C-0894); Madre Selva's Notification of Protests dated 3 Nov. 2016 (C-0895); Madre Selva's Notification of Protests dated 9 December 2016 (C-0930); Madre Selva's Notification of Protests dated 28 Feb. 2018 (C-0931); Madre Selva's Notification of Protests dated 22 Mar. 2018 (C-0896).

[880] CALAS' Notification of Protests dated 7 Mar. 2016 (C-0880).

[881] *Id.*

[882] Letter from Exmingua to the MEM, attaching Notary Public's Certification dated 21 Mar. 2012 (C-0013).

[883] *Id.*

[884] Report of the National Civil Police of Guatemala (PNC), Official Letter No. 164-2016/REF/JJGD/dl dated 10 May 2016 (R-0117) (noting that "at the main entrance of the project [] there were two people held by a group of approximately 50 people, members of the group of . . . held the gentlemen: Edgar Leonel ÁÍvarez and Julio Cesar Coc ÁÍvarez, both private security guards of the ORION company").

[885] Report of the National Civil Police of Guatemala (PNC), Official Letter No. 164-2016/REF/JJGD/dl 10 dated May 2016, at 2 (R-0117).

[886] *Id.* at 6.

[887] Jerson Ramos and Jose Rosales, "Protesters of La Puya burn doll of the Minister of Energy," *La Prensa Libre* dated 26 Mar. 2016 (C-0010).

289. *Third*, Guatemala's assertion that Claimants did not explain the arbitrariness of the MEM's decision to direct Exmingua to file the Santa Margarita EIA within 30 days also is wrong. Claimants explained in their Memorial that the MEM's demand was both unlawful and unreasonable.[888] In particular, as Claimants observed, the Mining Law does not permit the MEM to impose a 30-day deadline for submission of an EIA; Exmingua had a *amparo* action pending before the Guatemalan courts; a notary public had certified the resistance at the Project site; and Exmingua's request for suspension was in accordance with Article 50 of Guatemala's Judiciary Law, which provides that "[s]tatutory terms shall be barred in the event of a legitimate verified or notorious impediment."[889] Moreover, Exmingua already had submitted its EIA for the Santa Margarita exploitation license application to the MARN, with the MEM in copy, absent only the social studies section.[890]

290. The MEM's bad faith in imposing a 30-day deadline is further apparent when considering that the MARN took *almost a year* to review Exmingua's Progreso VII EIA in 2010-2011.[891] The MEM no doubt was aware of the time required for the MARN to review and approve Exmingua's Santa Margarita EIA, yet nevertheless held fast to its fabricated deadline.[892] Contrary to Guatemala's contention that it has been left "unable to engage" due to purportedly missing arguments, Guatemala, rather, appears *unable to respond*, further underscoring the arbitrary nature of its actions.

291. *Fourth*, Guatemala's assertion that Claimants' requests to the MEM "demonstrate[] Exmingua's willingness . . . to fail to comply with Guatemalan law" is misplaced. Contrary to Guatemala's characterization, Claimants did not request that the MEM "dispense with" "the [requirement] of an EIA in order to grant the exploitation permit."[893] Nor did Claimants suggest that "the MARN or the MEM abrogate this rule" or "repeal [this] substantive law."[894] Exmingua merely requested that the MEM "suspen[d] . . . *the request* for submission of a copy of the environmental impact assessment … *until there no longer is an impediment* . . . ."[895] In other words, Exmingua recognized it would need to file an approved EIA with the MEM, but merely asked the MEM to rescind its mandate that Exmingua file the EIA within 30 days, as "access to the project area has been

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[888] Clms' Mem. ¶¶ 116-124.

[889] *Id.*; Fuentes ¶ 78; Guatemala Judiciary Law, Arts. 23, 50 (C-0415).

[890] Clms' Mem. ¶ 121.

[891] Progreso VII EIA (C-0082); MARN Resolution No. 1010-2011 dated 23 May 2011, at 3 (C-0212).

[892] Official Notification No. 497 from the MEM to Exmingua, attaching Resolution No. 4056 dated 21 Dec. 2016 (C-0012); Official Notification No. 5099 from the MEM to Exmingua, attaching Resolution No. 1191 dated 5 Apr. 2017 (C-0014).

[893] Resp's C-M ¶ 451.

[894] *Id.* ¶¶ 359-360.

[895] Letter from Exmingua to the MEM, attaching Notary Public's Certification dated 21 Mar. 2012 (C-0013).

blocked."[896] Absent Guatemala's assistance to quell the protests and faced with the MEM's arbitrary deadline, Exmingua was left wholly unable to finalize its Santa Margarita exploitation license application, the better part of it left languishing in the MARN's archives. The confluence of these two factors was – not coincidentally – in keeping with the State's *de facto* moratorium on issuance of new mining licenses.

4. Exmingua's License Remains Suspended After More Than Five Years

292. Exactly one year ago, the Constitutional Court, in its 11 June 2020 decision, ordered the MEM to "complete the consultation process provided for under [ILO Convention 169] . . . within a term of *twelve months* as from the date on which this decision becomes final."[897] To date, the MEM has not taken any steps even to commence the Court-ordered consultation process.

293. Guatemala asserts vaguely and without any explanation or evidentiary support that this is so because the Constitutional Court's 11 June 2020 decision "is still not binding."[898] In his witness statement, Vice-Minister Pérez Ramírez states that a request for clarification made by the MARN is pending before the Constitutional Court, but does not reveal any further details, such as the date on which the request was filed or its content.[899] Notably, Guatemala did not submit a copy of any request for clarification with its Counter-Memorial. A press report published on 15 January 2021 refers to remarks attributed to the Minister of Energy and Mining suggesting that the consultation process for Progreso VII had not started because the Constitutional Court's decision was not yet final as a result of a pending request for clarification and amplification.[900] Yet, it was only on 9 April 2021 that Claimants received the MARN's request for clarification dated 1 September 2020, when Guatemala produced it upon the Tribunal's order in this Arbitration.[901]

294. As Professor Fuentes explains, a request for clarification or amplification under Articles 69-71 of the *Amparo* Law is the only remedy available against an appellate *amparo* decision such as the

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[896] *Id.*

[897] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision dated 11 June 2020, at 85-86 [at 42-43 ENG] (C-0145) (emphasis in original).

[898] Resp's C-M ¶ 638.

[899] Pérez ¶ 13.

[900] Rosa María Bolaños, "Having been suspended for nearly 4 years, the process of community pre-consultation is initiated for the San Rafael mine," *Prensa Libre* dated 15 Jan. 2021, at 5 [at 3 ENG] (C-0897).

[901] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, MARN's Request for Clarification dated 1 Sept. 2020 (C-0668); Letter from Guatemala's counsel to Claimants' counsel dated 9 Apr. 2021; Procedural Order No. 6 dated 15 Mar. 2021 ¶¶ 13-15 and Annex A.

Constitutional Court's 11 June 2020 decision.[902] Under Article 71 of the *Amparo* Law, a request for clarification or amplification must be filed within *24 hours* of notification of the decision, and the court must render its decision on any such request within *48 hours*.[903] As noted in Claimants' Memorial, Exmingua was notified of the Constitutional Court's 11 June 2020 decision on 23 June 2020.[904] In its request for clarification dated 1 September 2020, the MARN states that it was notified of that decision only on 31 August 2020.[905] It is inexplicable that the Constitutional Court notified the MARN of its decision more than two months after it notified Exmingua, given that the operative part of the decision contains a number of orders directly addressing the MARN and requiring its action.[906] Moreover, the decision was reported in the press, Government officials publicly commented on the decision shortly after its issuance,[907] and Claimants submitted a copy of the decision with their Memorial in this Arbitration in July 2020. There thus can be no doubt that the entire Government of Guatemala, including the MARN, was on notice of the decision, and it is unjustifiable for the Court to have delayed making an official notification with no apparent purpose other than to delay implementation of its own ruling.

295. Furthermore, Guatemala's argument that the 11 June 2020 decision presented no surprises or any unusual elements, but instead was fully consistent with the Constitutional Court's prior decisions involving consultations under ILO Convention 169,[908] is inconsistent with the Government's stance that clarification or amplification is required in order to implement the decision. Indeed, according to media reports, the MEM already has begun the consultation process for Minera San Rafael.[909] As in the case of Exmingua, the Constitutional Court had ordered the MARN to take a series of actions in its decision of the *amparo* appeal relating to Minera San Rafael's Escobal exploitation license.[910]

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[902] Fuentes II ¶ 102.

[903] *Amparo* Law, Art. 71 (C-0416).

[904] Clms' Mem. ¶ 135; Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Notification dated 23 June 2020 of 11 June 2020 ruling (C-0495).

[905] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, MARN's Request for Clarification dated 1 Sept. 2020, at 1 (C-0668).

[906] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision dated 11 June 2020, at 88-89 [at 44 ENG] (C-0145) (ordering the MARN to take a series of actions).

[907] *See*, *e.g.*, Rosa María Bolaños, "Exploitation of metallic minerals is suspended in Guatemala, after 3 CC judgments," *Prensa Libre* dated 26 June 2020 (C-0898).

[908] *See* Resp's C-M ¶¶ 130-132.

[909] Rosa María Bolaños, "Having been suspended for nearly 4 years, the process of community pre-consultation is initiated for the San Rafael mine," *Prensa Libre* dated 15 Jan. 2021, at 1 [at 1 ENG] (C-0897); "Pre-consultation for Pan American Silver's Escobal begins this month," Mining.com dated 6 Apr. 2021 (C-0899).

[910] Constitutional Court of Guatemala, Case No. 4785-2017, Decision dated 3 Sept. 2018, at 547-548 [at 31-32 ENG] (C-0459).

296. Indeed, the MARN's stated reason for requesting clarification makes no sense. As Professor Fuentes explains, under Article 70 of the *Amparo* Law, a party may request clarification if "the concepts of a judgment or order are obscure, ambiguous or contradictory."[911] In its request for clarification, the MARN asserted that the Constitutional Court's decision was inconsistent because it ordered the MARN to coordinate environmental measures in San Pedro Ayampuc and San José del Golfo, although the EIA for Progreso VII was approved only for San Pedro Ayampuc.[912] This assertion is contrived. While the Progreso VII mine is located in San Pedro Ayampuc, the EIA considered social and environmental impacts also on the surrounding towns and villages, including San José del Golfo.[913] Having approved the EIA, the MARN of course is fully aware of this. The only possible reason for the MARN to make this request for clarification is to provide a fabricated justification for delaying the commencement of consultations and, hence, for the indefinite suspension of Exmingua's operations.

297. In addition, as noted and as Professor Fuentes confirms, the Constitutional Court must rule on a request for clarification or amplification *within 48 hours*.[914] The Constitutional Court, moreover, appears to abide by this rule, as evidenced by the fact that it swiftly rejected Exmingua's request for amplification and clarification of its 5 May 2016 judgment within three calendar days.[915] Even ignoring the unjustifiable delay by the Court in officially notifying the MARN of its 11 June 2020 ruling (thus enabling the MARN to circumvent the 24-hour timeframe within which to file a request for clarification), the MARN's request was filed on 1 September 2020, and the Constitutional Court therefore should have ruled on that request no later than 3 September 2020. Yet, more than nine months later, that request remains pending, providing Guatemala with another convenient, self-made excuse for avoiding its obligations and keeping intact the indefinite suspension of Exmingua's license.

298. Moreover, regardless of the finality of the Court's 11 June 2020 decision, the MEM has been obligated to conduct and complete the consultations since the Supreme Court and the Constitutional Court ordered it to do so in 2015. In its November 2015 decision granting the *amparo provisional*, the Supreme Court suspended Exmingua's license pending completion by the MEM of consultations; although that Court decision did not expressly order the MEM to conduct the consultations, such

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[911] *Amparo* Law, Art. 70 (C-0416); Fuentes II ¶ 102.

[912] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, MARN's Request for Clarification dated 1 Sept. 2020, at 3-4 (C-0668).

[913] *See* Progreso VII EIA, at 58-59 (C-0082).

[914] *Amparo* Law, Art. 71 (C-0416); Fuentes II ¶ 102.

[915] Constitutional Court of Guatemala, Consolidated Cases Nos. 795-2016 and 1380-2016, Decision dated 9 May 2016 on Exmingua's request for amplification and clarification, at 4 [at 3 ENG] (C-0554); *see also* Clms' Mem. ¶ 90.

direction must be implied from its purpose, as stated by CALAS in requesting the suspension by means of an *amparo provisional* "to restore the right to consultation."[916] In its 5 May 2016 decision, rejecting the appeals by Exmingua and the MEM of the Supreme Court's 11 November 2015 *amparo provisional*, the Constitutional Court not only affirmed the suspension of Exmingua's license, but made explicit the MEM's obligation to conduct consultations, ruling that the MEM "may reinstate the validity of the mining exploitation license upon conducting and completing, as soon as practicable, the prior and informed consultation procedure pursuant to ILO Convention No. 169."[917]

299. As Professor Fuentes explains, under the *Amparo* Law, appellate decisions of the Constitutional Court in *amparo* proceedings are final, unless a party timely files a request for clarification or amplification.[918] Here, there was no request for clarification or amplification filed with respect to the Constitutional Court's ruling on the *amparo provisional*, which the Court clearly considered to be in full force and effect when it rejected Exmingua's request to revoke that decision on 5 October 2017, ruling that "there remain circumstances which make it advisable to maintain this provisional protection."[919] The MEM's report filed with the Court on 11 June 2020 confirms this understanding, as it repeatedly refers to the MEM's obligation under orders by the Supreme Court and the Constitutional Court to conduct consultations under ILO Convention 169.[920]

300. Accordingly, after the MEM had been obligated for more than four years to conduct the consultations, it makes no sense for Guatemala to argue in its Counter-Memorial in December 2020 that the MEM cannot do so because the Constitutional Court's 11 June 2020 decision is not final. As the MEM's report reveals, the MEM did begin reaching out to the local communities immediately after the Constitutional Court's 5 May 2016 decision in order to try to establish an agreed process to conduct consultations. The report also reveals the very different reason given by the MEM for its failure to move forward with preparing for consultations since early 2017:

> [T]he rejection on repeated occasions by the members that make up the so-called La Puya Peaceful Resistance Movement, and the non-attendance of the various municipal and community actors, at meetings organized by this Ministry, have made

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[916] CALAS's Request for New *Amparo* dated 29 Aug. 2014, at 19-20 [at 12 ENG] (C-0137).

[917] Constitutional Court of Guatemala, Consolidated Cases Nos. 795-2016 and 1380-2016, Decision dated 5 May 2016, at 4 [at 4 ENG] (C-0143); *see also* Clms' Mem. ¶ 89.

[918] Fuentes II ¶ 102.

[919] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Order dated 5 Oct. 2017 rejecting Exmingua's request for revocation, at 1 [at 1 ENG] (C-0563).

[920] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, MEM Report dated 10 June 2011, submitted to the Constitutional Court on 11 June 2020 under cover of Letter from the MEM dated 9 June 2020, at 4, 7, 12, 15 (C-0872).

> it difficult to effectively verify a process of community dialog and participation to establish a roadmap for the development of the Consultation in accordance with International Labour Organization Convention 169 on Indigenous and Tribal Peoples.[921]

301. The report indicates that at meetings, which the MEM held for the purpose of preparing for consultations, participants identifying themselves as being part of La Puya were not interested in consultations, but instead were interested in terminating mining projects altogether.[922] By contrast, as the report also shows, in January and February 2017, authorized representatives of the COCODES of 19 local villages separately met with the MEM's Vice-Minister of Sustainable Development, or sought to meet with him, "to express their support for the Progreso VII Derivada mining right."[923]

302. In his witness statement, Mr. Pérez, the MEM's Vice-Minister for Sustainable Development, does not mention any of this. Rather, he asserts generally and without any evidence that "the Executive Branch is currently developing a proposal for Regulations containing guidelines to carry out the consultations with Indigenous Peoples, which can be issued as a Governmental Agreement."[924] Mr. Pérez fails to mention, however, that the Constitutional Court already in 2011 declared unconstitutional draft consultation regulations proposed by the Executive Branch, and just last year rejected a request by the President of Guatemala for an advisory opinion on the constitutionality of a new draft of such regulations.[925] Additionally, Mr. Pérez ignores that the Constitutional Court has since 2007 emphasized the need for the Legislative Branch to enact such guidelines, and even has ordered it to do so, albeit unsuccessfully.[926]

303. The witness statement of Mr. Pérez stands in stark contrast with recent public statements by both the former and the current minister of energy and mines. As the former Minister of Energy and Mines told the press: "Unfortunately during all of the previous government nothing happened, nothing

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[921] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, MEM Report dated 10 June 2011, submitted to the Constitutional Court on 11 June 2020 under cover of Letter from the MEM dated 9 June 2020, at 15 (C-0872).

[922] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, MEM Report dated 10 June 2011, submitted to the Constitutional Court on 11 June 2020 under cover of Letter from the MEM dated 9 June 2020, at 12 (C-0872).

[923] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, MEM Report dated 10 June 2011, submitted to the Constitutional Court on 11 June 2020 under cover of Letter from the MEM dated 9 June 2020, at 9, 10 (C-0872).

[924] Pérez ¶ 15.

[925] *See* Constitutional Court of Guatemala, Case No. 1072-2011, Decision dated 24 Nov. 2011, at 1, 11-12 (C-0659); Constitutional Court of Guatemala, Case No. 306-2020, Decision dated 7 July 2020, at 22-23 [at 4 ENG] (C-0660); *see also* Fuentes II ¶¶ 62-64.

[926] *See* Fuentes I ¶¶ 50-51; Fuentes II ¶¶ 54, 57-69.

moved forward, and that obviously hurts investments."[927] And in a recent interview, current Minister of Energy of Mines Alberto Pimentel stated with respect to the suspension of Minera San Rafael's Escobal exploitation license:

> [T]he El Escobal mining project [] is believed to be able to generate around 1% of the [national] GDP. Nationally, we would be talking about approximately 6 billion Quetzals. That is not being generated today, because evidently [] the mine is suspended, but the impact is even greater, because associated with the closure of the mine or the suspension of the mine, [] an economy that was prepared to serve the workers [], has suffered . . . . [O]ur estimates state that we have a potential for this specific activity to exceed around 4 or 5% of the [national] GDP. That is why it is important that we generate that certainty in investments, that we can exploit our wealth as a country.[928]

304. Addressing the Constitutional Court's decisions concerning Oxec, Minera San Rafael, CGN and Exmingua, Minister Pimentel said the following:

> I also do not understand the reasons that led the courts to suspend these operations, especially when it is very clear that the government is required to carry out the consultation, in this case, the Government of the Republic of Guatemala. [A]nd in fact I understand less when this same Constitutional Court, in a case that legally is of the same kind, ruled differently, I mean the case of the Oxec I and Oxec II hydroelectric plants where [the Court] ordered the Ministry of Energy and Mines to carry out the consultation process but clearly stated that, given that the investor is not liable for the lack of consultation, well, [] the operation is not going to be suspended. The truth is that then comes the judgment in Escobal and then have come two more unfortunate companies, with the last three I am referring to mining operations, where they have suspended the right. In the end, although I do not understand it, what I can tell you is that, in a state governed by the rule of law, the decisions of the courts are complied with, and the Ministry of Energy and Mines has been obliged to suspend the rights until the consultations have been implemented.[929]

305. In his inaugural address on 14 April 2021, the current President of the Constitutional Court, Roberto Molina Barreto, also made critical comments about the politicization of the Court's recent decisions involving the right to consultation under ILO Convention 169, which had unfairly penalized companies that had complied with the law:

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[927] "Pre-consultation for Pan American Silver's Escobal begins this month," *Mining.com* dated 6 Apr. 2021 (C-0899).

[928] Transcript of Interview by Canal Antigua #Alas845 with Alberto Pimentel dated 5 Apr. 2021, at 2 (Minutes 18:33-20:05) (C-0900).

[929] Transcript of Interview by Canal Antigua #Alas845 with Alberto Pimentel dated 5 Apr. 2021, at 1-2 (Minutes 17:07-18:13) (C-0900).

> "The function of the court is to generate the least possible impact. Not cause more unemployment, more separation of families with the closure of companies. But at the same time contribute to the conservation of the environment without reducing tax collection, among other elements. What seems not to have been taken into account, mainly in the application of ILO 169 Convention, as the exploitation of natural resources is inevitable and the right of consultation with the peoples is undeniable, *what is unacceptable is the ideologization and politicization of proceedings*. The Constitutional Court, I insist, must be meticulous and refrain from compiling these international standards on Human Rights at (their own) convenience and to (their) measure (…) Even though Article 43 of the *Amparo*, *Habeas Corpus* and Constitutionality Law empowers the Constitutional Court to be able to separate itself from its own jurisprudence, *this must be the product of a duly reasoned innovation and not the result of a selective, casuistic, or capricious application*. For this reason, I consider it of vital importance that in the Eighth Magistracy the Jurisprudence and Gazette Unit of the Court be strengthened in order to be able to carry out a careful review of the *different standards issued* and an effective and accurate classification of the established judgments, jurisprudence and legal doctrine, to make it truly accessible and understandable for the user.[930]

306. Constitutional Court President Molina elaborated further on this criticism in an interview, as follows:

> In terms of Human Rights, the most controversial has been the application of the ILO 169 Convention because *there have been many problems, many contradictory rulings*. Many resolutions that *in some (cases) companies are closed and in others are not* and that causes another series of problems such as unemployment, the separation of families because they are going to look for their future in other countries and I believe that there have been a series of problems and, please excuse me for insisting, but these has been caused by this last magistracy, because *in the same circumstances, they resolve in a different way*. Why do I say this? Because the right of the States to take advantage of their natural resources is undeniable, as long as the right of consultation of the peoples is also respected. What has been misinterpreted is what it is, what this consultation procedure consists of and of course it is undeniable that the environment must be taken care of.
>
> So this has created a situation that is often foreign to the companies or the communities around the projects. It seems that is more an interest of social groups that have even been able to manipulate situations and that seem to live from social conflict and cause polarization and cause a court to already get into situations that do not concern it. And as I say when there is a contradiction of rulings, it seems that the consultation processes are being politicized because the one who is obliged to consult

[930] Roberto Molina Barreto, "The Function of the Constitutional Court in the Republican System of Government," Inaugural Address as President of the Court dated 14 Apr. 2021, at 9-10 [at 9-10 ENG] (C-0671) (emphasis added).

> is the State through the competent bodies. And, when there is closure and when there are no closings, this obviously causes legal uncertainty in all issues, lack of legal certainty, that depresses investment in the country and causes a series of unfortunate conflicts. And sometimes, many of the resolutions (are) taken very arbitrarily and in a capricious way.[931]

307. Guatemala's disparate treatment of Exmingua thus is undeniable.[932] In the *Oxec* case, for instance, the Constitutional Court issued guidelines for the conduct of consultations, permitted continued operations pending completion of consultations, and, just one month after the Constitutional Court's ruling, the MEM reported that it had executed a consultation plan for the Oxec project.[933] Six months later, the MEM completed consultations with 11 communities in the Oxec project's area of influence.[934] As Minister Pimentel acknowledged, the Constitutional Court's decision in the *Oxec* case contrasts with its decisions in the cases of San Rafael, CGN and Exmingua, in that the Court allowed the consultations to proceed without suspending the operation of Oxec's projects – although the cases were all of the same kind.

308. Guatemala's treatment of Exmingua also is disparate from its treatment of *Minera San Rafael* and *CGN*. As noted, the consultation process already has begun for Minera San Rafael's Escobal exploitation license,[935] while Guatemala continues to delay the start of consultations for Exmingua's exploitation license. In the case of CGN, the Constitutional Court ordered the suspension of the Fénix exploitation license on 18 June 2019 and, on 18 June 2020, issued a final ruling that maintained the suspension and directed the MEM to carry out consultations within 18 months.[936] Despite these rulings, the mine reportedly continued to operate for another 19 months, until 2 February 2021, when the MEM notified CGN that the license was suspended.[937] In Exmingua's case, the Supreme Court

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[931] Transcript of Interview by Canal Antigua with Roberto Molina Barreto, President of the Constitutional Court, dated 15 Apr. 2021, (Minute 15.00) (C-0901) (emphasis added).

[932] *See* Clms' Mem. ¶¶ 103, 107-115.

[933] Clms' Mem. ¶¶ 107-108; *see also* Constitutional Court of Guatemala, Consolidated Cases Nos. 90-2017, 91-2017 and 92-2017, Decision dated 26 May 2017, at 101 [at 4 ENG] (C-0441); *see also* Request of Exmingua to the Constitutional Court dated 8 June 2017 (C-0555) (requesting revocation of the Court's ruling dated 5 May 2016 affirming the *amparo provisional*, citing to changed circumstances given the Court's ruling in the *Oxec* case).

[934] Clms' Mem. ¶ 108.

[935] Rosa María Bolaños, "Having been suspended for nearly 4 years, the process of community pre-consultation is initiated for the San Rafael mine," *Prensa Libre* dated 15 Jan. 2021, at 1 [at 1 ENG] (C-0897); "Pre-consultation for Pan American Silver's Escobal begins this month," *Mining.com* dated 6 Apr. 2021 (C-0899).

[936] Clms' Mem. ¶ 115; Constitutional Court of Guatemala, Case No. 697-2019, Decision dated 18 June 2020, at 87, 269, 274 [at 3, 4 ENG] (C-0496).

[937] Solway Investment Group's Official Statement Regarding Suspension of the Fénix Project's License dated 20 June 2020 (updated 8 Feb. 2021) (C-0902).

ordered the suspension of Exmingua's exploitation license on 11 November 2015, and the MEM notified Exmingua of the suspension four months later, on 18 March 2016.[938]

309. As shown, Guatemala's attempt to justify its discriminatory treatment by pointing to social unrest must fail, as it is a thinly disguised effort to shift onto Exmingua and ultimately Claimants the responsibility for its own failure over the past 25 years to implement the consultation requirement under ILO Convention 169. Exmingua's operations have been suspended for more than five years, without any consultations having even begun. Clearly, therefore, suspension is not required for consultations to take place, and the suspension thus is disproportionate, arbitrary and discriminatory.

5. Guatemala Pursued Baseless Criminal Actions Against Exmingua

310. Shortly after issuing the suspension order in March 2016, Guatemala baselessly initiated criminal actions, impounded Exmingua's gold concentrate, and refused to release it for almost four years, as detailed in Claimants' Memorial[939] and below.

a. Guatemala Staged An Undercover Operation Targeting Exmingua

311. As demonstrated in Claimants' Memorial, on 9 May 2016, four days after the Constitutional Court determined that Exmingua's Progreso VII exploitation license would regain effectiveness only after the MEM conducted consultations, the Public Prosecutor's office staged an undercover operation involving the Attorney General's Office, the Environmental Crimes Prosecution Office, the Crime Scene Investigation Division, and the MEM, in which it stopped and searched a vehicle occupied by four Exmingua workers, detained the workers, and seized 19 bags of gold concentrate.[940]

312. In its Counter-Memorial, Guatemala emphasizes as an "issue of great importance . . . that there was no 'undercover operation' to detain the employees of Exmingua who were transporting the gold concentrate . . . while what occurred here was a simple routine traffic stop that resulted in the determination that the individuals involved were blatantly committing a crime."[941]

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[938] Clms' Mem. ¶¶ 97-98; Resolution No. 1202 of the Ministry of Energy and Mines dated 10 Mar. 2016 (C-0139) (with notification to Exmingua dated 18 Mar. 2016); Supreme Court of Guatemala, Case No. 1592-2014, Decision dated 11 Nov. 2015, at 1 [at 1 ENG] (C-0004).

[939] Clms' Mem. ¶¶ 125-132; *see also* Fuentes I ¶¶ 185-193; Fuentes II ¶¶ 163-167.

[940] Clms' Mem. ¶ 126; Guatemalan Civil Police, Investigation Report dated 9 May 2016 (C-0148); *see also* Entry in Register 359-2017 of the Evidence Warehouse Department of the Central Judicial Warehouse of the Judiciary of Guatemala dated 27 July 2017 (R-0125) (recording the receipt of 19 bags of gold concentrate); Resp's C-M n. 578.

[941] Resp's C-M ¶ 354.

313. Guatemala's bald assertion ignores and is belied by the evidence, specifically the investigation report filed with the court on 9 May 2016 by the Guatemalan Civil Police, which expressly refers to an "undercover operation" that was initiated at the request of the Environmental Crimes Prosecution Office of the Public Prosecutor's Office.[942] The report further specifies:

> [A]n undercover operation was put in place on this date (9 May 2016), at 10 am . . . . The operation took place . . . at a gold and silver ore warehouse. At 10.30 am, a . . . pick-up truck . . . left the building. The officers pulled it over to identify and search both the vehicle and the persons in it.[943]

Rather than a routine traffic stop, this clearly was a targeted operation in the context of a criminal investigation by a specialized branch of Guatemala's law enforcement authorities.

314. Contrary to Guatemala's contention in its Counter-Memorial that this "stop" "resulted in the determination that the individuals involved were blatantly committing a crime," the ensuing criminal action against the four workers, accusing them of illegally exploiting natural resources, was dismissed the very next day by the Fourth Court of First Instance in Criminal Matters, Drug Dealing and Environmental Crimes ("Fourth Criminal Court of First Instance").[944] That court also ordered the Public Prosecutor's Office to be notified "so that an investigation is conducted regarding the fact that the defendants may have been illegally arrested."[945] The Public Prosecutor's Office appealed this decision, but the appeal also was dismissed, whereupon the Public Prosecutor's Office brought subsequent actions before the Supreme Court and the Constitutional Court, which resulted in confirmation of the workers' innocence of the criminal charges.[946]

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[942] Guatemalan Civil Police, Investigation Report dated 9 May 2016, at 1-2 [at 2 ENG] (C-0148).

[943] *Id.*, at 1-2 [at 2 ENG].

[944] *See* Court of Appeals in Criminal Matters, Drug Dealing and Environmental Crimes, 4th Division, Case No. 242-2016, Decision dated 11 May 2018, at 1 [at 1 ENG] (C-0545) (quoting from the decision of 10 May 2016 of the Fourth Criminal Court of First Instance).

[945] *See* Court of Appeals in Criminal Matters, Drug Dealing and Environmental Crimes, 4th Division, Case No. 242-2016, Decision dated 11 May 2018, at 1 [at 1 ENG] (C-0545) (quoting from the decision of 10 May 2016 of the Fourth Criminal Court of First Instance).

[946] Clms' Mem. ¶ 127, 129-131; *see also* Supreme Court of Guatemala, Case No. 1464-2016, Decision dated 2 July 2019, at 1-2 [at 1-2 ENG] (C-0509) ("the Public Prosecutor's Office . . . filed an *amparo* appeal against the decision of 26 May 2016 entered [by the Fourth Criminal Court of First Instance]; [] the Preliminary Trial and *Amparo* Court of the Supreme Court of Justice denied the *amparo* appeal through a decision entered on 25 May 2017, on the grounds that it was notoriously inadmissible; [] the Public Prosecutor's Office . . . appealed the aforementioned judgment; [] the Constitutional Court, through a decision entered on 30 January 2018, admitted the appeal and, consequently, revoked the judgment on appeal, and granted the *amparo* requested by the Public Prosecutor's Office, set aside the court ruling of 26 May 2016, with respect to the petitioner, and ordered that a new ruling be issued in consistency with the court's considerations within such term and subject to such applicable penalty as established to such end by the Constitutional Court; [] in compliance with the ruling from the Constitutional Court, the 4th Division of the Court of Appeals in Criminal Matters, Drug Trafficking and Environmental Crimes entered a decision on 11 May 2018, whereby it set aside the appeal filed by the Public Prosecutor's

315. Notwithstanding the utterly baseless arrests and impoundment, the dismissal of the case the very next day and the subsequent dismissal of all appeals by July 2019, the impounded concentrate was returned only a few weeks before the filing of this Reply Submission, in April 2021, as discussed further below.[947]

b. Guatemala Seized Further Concentrate Without Cause And Refused To Release It For Almost Four Years

316. As also set forth in Claimants' Memorial, in addition to arresting the four workers and seizing the concentrate they were transporting, on 6 June 2016, the Deputy Prosecutor of the Public Prosecutor's Office, acting on an order issued the day before by the Fourth Criminal Court of First Instance and accompanied by representatives of the MEM and police, inspected and sequestered Exmingua's mine site and plant.[948] The inspection resulted in the impoundment of large quantities of Exmingua's gold concentrate.[949]

317. In its Counter-Memorial, Guatemala asserts that Claimants had failed to mention that a significant portion of concentrate was being held at Exmingua's facilities, and that "[u]p to the latest information available, Exmingua had not requested the return of the gold concentrate from the Criminal Court of Fourth Instance [*sic*]."[950]

318. These assertions are blatantly incorrect. Claimants' Memorial clearly states that "despite the dismissal of the criminal charges against Exmingua's workers and Exmingua's continuous efforts to have its concentrate released, the 19 bags of gold concentrate seized on 9 May 2016 and the gold concentrate located at the site and sequestered further to the 5 June 2016 order remain impounded."[951] Claimants' Memorial also clearly references Exmingua's request of 22 January 2020 to the Fourth Criminal Court of First Instance seeking the lifting of the sequestration of its facilities, equipment and

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Office"); *id*. at 8 [at 5 ENG] (dismissing the Public Prosecutor's Office's appeal, finding that the decision of 11 May 2018 was "in compliance with [] the ruling issued by the Constitutional Court"); Court of Appeals in Criminal Matters, Drug Dealing and Environmental Crimes, 4th Division, Case No. 242-2016, Decision dated 11 May 2018 (C-0545) (dismissing the Public Prosecutor's Office's action).

947 *See also* Clms' Mem. ¶ 127; Kappes I ¶ 140.

948 Clms' Mem. ¶ 128; Fourth Criminal Court of First Instance, Case No. C-01069-2016-00228, Order dated 5 June 2016 (C-0547); Public Prosecutor's Office, Report dated 6 June 2016 (C-0549).

949 Clms' Mem. ¶ 128; Justice of the Peace of San José del Golfo, Case No. C-01069-2016-00228, Ruling No. 008-2016 dated 24 June 2016 (C-0548) (report of inspection of Exmingua's warehouse and weigh-ins of sequestered bags of concentrate); Public Prosecutor's Office, Report dated 6 June 2016 (C-0549).

950 Resp's C-M ¶ 356; *see also id*. ¶ 526.

951 Clms' Mem. ¶ 132.

machinery, including the gold concentrate (more than 10 months before Guatemala submitted its Counter-Memorial in this Arbitration).[952]

319. Guatemala further attempts to distract from its unlawful sequestration of the concentrate by referring to "kidnapped objects" whose return the Court or the Office of the Public Prosecutor allowed in 2018.[953] As the documents cited by Guatemala show, these objects were computers that were seized from Exmingua's offices on 7 June 2016, and their return had been requested by Exmingua's attorney.[954] These documents further highlight Exmingua's continuous efforts to recover its sequestered property.

320. Additionally, Guatemala asserts, without any support, that "the criminal investigation is still open and is still being conducted by the competent authorities in Guatemala."[955]

321. This assertion also is blatantly incorrect. At the hearing that was finally held on 25 March 2021 (after being repeatedly postponed by Guatemala) on Exmingua's request to release the concentrate, among other things, the Public Prosecutor's Office confirmed that "no further proceedings are pending and all necessary investigations have already been conducted in this proceeding."[956] The Court agreed:

> As requested, the closure is lifted . . . because the closure no longer has a reason to exist. There are no further investigations to be conducted in this proceeding, and it is precisely within the framework of this proceeding that the closure was ordered. In this same vein, the ban on mobilization is lifted from the machinery, equipment, materials, and tools inside the property because there is also no reason to maintain the ban, which is usually ordered to facilitate certain investigations, but no investigations are pending on those objects. The party also requested the return of 11 bags seized during the search that belong to it since no property rights were violated.[957]

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[952] *Id.* ¶ 132; *see also* Request by Exmingua dated 22 Jan. 2020 for Termination of Closure, Demobilization of Equipment and Liberation of Machinery, submitted to the Fourth Criminal Court of First Instance on 31 Jan. 2020 in Case No. 01069-2016-00228 (C-0454).

[953] Resp's C-M ¶ 356, n. 577.

[954] Fourth Criminal Court of First Instance, Case No. 1069-2016-00228, Order dated 27 Apr. 2018 (R-0122) (ordering the return of computers at the request of Exmingua's attorney); Environmental Prosecutor's Office, Case No. 0109-2016-00228, Writ dated 4 June 2018 to the Fourth Criminal Court of First Instance (R-0123) (seeking a new court order for the return of the computers because the original order misidentified the judicial warehouse in which the computers were being held).

[955] Resp's C-M ¶ 355; *see also id.* ¶ 525 ("[T]he investigation is still ongoing.").

[956] Fourth Criminal Court of First Instance, Case No. 1069-2016-00228, Transcript of hearing held on 25 Mar. 2021, at 6 [at 6 ENG] (C-0677); Fourth Criminal Court of First Instance, Case No. 1069-2016-00228, Order dated 3 Mar. 2020 (C-0903) (postponing hearing from 3 Mar. 2020 to 28 July 2020); *see also* Fuentes II ¶ 164.

[957] Fourth Criminal Court of First Instance, Case No. 1069-2016-00228, Transcript of hearing held on 25 Mar. 2021, at 6 [at 6 ENG] (C-0677); *see also* Fuentes II ¶ 164.

322. In opposing the Attorney General's appeal, the Public Prosecutor's Office further pointed out that "[h]olding personal or real property that is closed or immobilized unnecessarily could make us liable for abuse of authority or thwarting access to private property. . . . if the investigations required for criminal action in this proceeding were yet pending, it would be reprehensible because we've had years to build a strong case."[958] The Public Prosecutor's Office added that "we cannot just cook up actions and attribute a noncompliance by the State to a person that basically met all requirements …."[959] The Court agreed and granted Exmingua's request and dismissed the Attorney General's appeal (supported by CALAS), finding that the State had had more than three years to find any wrongdoing by Exmingua "which is more than enough time to conduct an investigation."[960]

323. In granting Exmingua's request, the Court ordered "the reopening of the closed property and the termination of the ban on the mobilization of the requested goods so they can be returned."[961] The Court also ordered that "the machinery will be returned under custody, the equipment mentioned in the search and seizure record, which is going to be returned, as well as the 11 requested bags."[962] As Professor Fuentes notes, the Court's reasoning confirms his explanation of the law set out in his First Opinion, in particular, that "under Articles 200, 201 and 202 of the Criminal Procedure Code, seized objects must be returned to their lawful owner as soon as they are no longer required."[963] Indeed, the Court determined that, "pursuant to the cited Articles, the property has been closed for too long . . . and there is no reason for the property to remain closed and the machinery to remain immobilized, meaning the objects found during the search and seizure . . . ."[964]

324. On 14 April 2021, the Court issued an order at Exmingua's request, directing the MEM and the Public Prosecutor's Office to re-open the property on 21 May 2021.[965] As Mr. Kappes explains in his witness statement, the release of the concentrate is only the first of several steps required to

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[958] Fourth Criminal Court of First Instance, Case No. 1069-2016-00228, Transcript of hearing held on 25 Mar. 2021, at 10 [at 10 ENG] (C-0677); *see also* Fuentes II ¶ 166-167.

[959] Fourth Criminal Court of First Instance, Case No. 1069-2016-00228, Transcript of hearing held on 25 Mar. 2021, at 10 [at 10 ENG] (C-0677); *see also* Fuentes II ¶ 166-167.

[960] Fourth Criminal Court of First Instance, Case No. 1069-2016-00228, Transcript of hearing held on 25 Mar. 2021, at 12 [at 12 ENG] (C-0677); *see also* Fuentes II ¶ 166-167.

[961] Fourth Criminal Court of First Instance, Case No. 1069-2016-00228, Transcript of hearing held on 25 Mar. 2021, at 7 [at 7 ENG] (C-0677); *see also* Fuentes II ¶ 165.

[962] Fourth Criminal Court of First Instance, Case No. 1069-2016-00228, Transcript of hearing held on 25 Mar. 2021, at 7 [at 7 ENG] (C-0677); *see also* Fuentes II ¶ 165.

[963] Fuentes II ¶ 166; *see also* Fuentes I ¶ 191.

[964] Fourth Criminal Court of First Instance, Case No. 01069-2016-00228, Transcript of hearing held on 25 Mar. 2021, at 67 [at 6-7 ENG] (C-0677); *see also* Fuentes I ¶ 192; Fuentes II ¶ 166.

[965] Fourth Criminal Court of First Instance, Case No. 01069-2016-00228, Order dated 14 Apr. 2021, at 1 [at 1 ENG] (C-0678); *see also* Fuentes II ¶ 167.

mitigate the harm caused by its seizure.[966] These include moisture-adjusting the concentrate, which has been stored for the last few years, to ensure its moisture level is proper and re-packaging it in bags and containers for shipping so that it can be exported for sale.[967] Exmingua also will need to obtain a new certificate or other permission to export the concentrate. Further, it will need to ensure that the purchaser with whom it had contracted remains willing to pay for the concentrate that it was scheduled to purchase more than five years ago, or otherwise find another purchaser.[968]

325. Immediately after the Court ordered the concentrate released, the Attorney General's Office impounded Exmingua's bank accounts on the basis of an unpaid fine levied by the MEM on Exmingua in 2016 for having continued operations beyond 18 March 2016 through May 2016.[969] The impoundment is unreasonable and disproportionate, because it disregards the fact that Exmingua needs the impounded bank accounts to pay for the performance of its ongoing environmental monitoring obligations at the mine and to maintain its offices and staff.[970] It also unnecessarily aggravates the dispute before this Tribunal, as it seeks to penalize Exmingua by enforcing the suspension of its operations, which is at the core of this matter.[971] Moreover, because Exmingua's operations have been suspended since 2016 and it has no revenue stream, paying the fine would require Claimants to make a further investment in Guatemala, which has destroyed its investment. Indeed, Claimants would be placed in the untenable situation of paying Guatemala only to then increase its damages claim in this Arbitration.

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[966] Kappes II ¶ 77.

[967] *Id.* ¶ 78.

[968] *Id.*

[969] *Id.* ¶ 79; MEM, Resolution No. 384 dated 16 Nov. 2016, at 3 (C-0904) (imposing a fine of Q280,000 on Exmingua for non-compliance with the MEM's Resolution No. 1202 dated 10 Mar. 2016, notified to Exmingua on 18 Mar. 2016 (C-0139)). The MEM subsequently dismissed Exmingua's request for revocation of Resolution No. 1202, and the Supreme Court and the Constitutional Court dismissed Exmingua's *amparo* petition and appeal. *See* Exmingua's Request for Revocation dated 24 Jan. 2017 (C-0905); MEM Decision dismissing Exmingua's request for revocation dated 5 Sept 2017 (C-0906); Supreme Court of Guatemala, Case No. 587-2016, Decision dated 10 May 2016 (C-0907) (dismissing Exmingua's *amparo* petition on the ground that the pending *amparo* proceeding initiated by CALAS concerned the same matter); Constitutional Court of Guatemala, Case No. 6095-2017, Decision dated 19 Feb. 2018 (C-0908) (dismissing Exmingua's appeal).

[970] Kappes II ¶ 79.

[971] *See* Supreme Court of Guatemala, Case No. 587-2016, Decision dated 10 May 2016 (C-0907) (dismissing Exmingua's *amparo* petition challenging MEM Resolution 1202, on the ground that the pending *amparo* proceeding initiated by CALAS concerned the *same matter*).

III. LAW

A. Jurisdiction

1. Guatemala's Illegality Objection Fails

326. Respondent irresponsibly raises in its Counter-Memorial a baseless illegality jurisdictional defense.[972] In doing so, Respondent argues at length that the Tribunal lacks jurisdiction under the DR-CAFTA over claims concerning an unlawfully-made investment.[973] Respondent next purports to summarize cases where tribunals have dismissed claims after having found that the claimant procured its investment by corruption or fraud.[974] It then complains about alleged deficiencies in Exmingua's Progreso VII EIA that the MARN approved,[975] and erroneously asserts that Exmingua lacked a valid construction permit.[976] Finally, Respondent declares that "Claimants consistently violated the laws of Guatemala, or at the very least showed a consistent willingness to ignore Guatemala's legal system."[977] As demonstrated below, Respondent's illegality defense fails as a matter of law and fact.

a. Guatemala's Illegality Objection Fails As A Matter of Law

327. *First*, Respondent assumes, but has not demonstrated, that illegality of the investment is a jurisdictional bar under the DR-CAFTA. Unlike the definition of "investment" in other investment treaties, including in several to which Guatemala is Party,[978] DR CAFTA Article 10.28 does not restrict the definition of investments to those "made in accordance with the laws and regulations" of the host State.[979] Nor does the DR-CAFTA contain any other provision providing a so-called "legality" clause. In such circumstances, tribunals properly have found that issues concerning the

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[972] Respondent's purported reservation of rights (Resp's C-M ¶ 220) to "raise objections in defending the claims in any future phases of this Arbitration, including but not limited to objections to the jurisdiction of the Tribunal or the admissibility of claims, to illegalities concerned with constitution and operation of investment [sic]" is ineffective. *See* ICSID Arb. Rule 41.

[973] *See* Resp's C-M ¶¶ 164-167, 183-199.

[974] *See Id.* ¶¶ 168-182.

[975] *See Id.* C-M ¶¶ 200-207.

[976] *See Id.* ¶¶ 208-214.

[977] *Id.* ¶¶ 215-219.

[978] *See, e.g.*, Guatemala-Finland BIT dated 12 Apr. 2005, Art. 1.1 (CL-0360) ("The term 'investment' means every kind of asset *established or acquired* by an investor of one Contracting Party in the territory of the other Contracting Party *in accordance with the laws and regulations* of the latter Contracting Party") (emphasis added); Guatemala-Russia BIT dated 27 Nov. 2013, Art. I(2) (CL-0361) ("'Investments' are all kinds of property assets *invested* by investors of one Contracting Party in the territory of the State of the other Contracting Party *in accordance with the legislation* of the State of the latter Contracting Party") (emphasis added).

[979] *See* DR-CAFTA, Art. 10.28 (CL-0001). Respondent's references to the provisions of Guatemala's Foreign Investment Law (*see* Resp's C-M ¶¶ 164, 183) are misplaced, because Claimants rely solely on the DR-CAFTA as a basis for the Tribunal's jurisdiction.

legality of the investment are not relevant to the jurisdiction of the tribunal. The *Achmea v. Slovakia* tribunal, for example, held that because the Netherlands-Slovakia BIT did not contain any so-called "legality clause," the treaty needed to be interpreted "without reading in a requirement that there must be no infraction of the host State's law in the course of the making of the investment."[980]

328. Guatemala's effort to read a "legality" clause into Article 10.28 of the DR-CAFTA[981] accordingly is misplaced. Indeed, Article 10.28 defines "investment" as "*every* asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment" and includes a non-exhaustive list of the "[f]orms that an investment may [] include."[982] The expression "licenses, authorizations, permits, and similar rights conferred pursuant to domestic law," upon which Guatemala relies for its misguided interpretation,[983] appears in this non-exhaustive list; it does not import a "legality" clause into the Treaty. Guatemala's reference to footnote 10 in Article 10.28 and Art. 10.14(1) for support of its strained interpretation[984] also is unconvincing. Footnote 10 confirms that the modifier "conferred pursuant to domestic law" relates to the nature of the rights granted to the investor under the license, authorization, or permit, and not to the procedure by which the rights are granted.[985] Further, although Article 10.14(1) provides that the DR-CAFTA's national treatment provision does not prohibit Parties from adopting measures requiring that "covered investments be legally constituted under the laws or regulations of the Party," Guatemala fails to point to any such measures bearing upon Claimants' investments.[986]

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[980] *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic [I]*, PCA Case No. 2008-13, Final Award dated 7 Dec. 2012 ¶ 171 (CL-0268) ("[I]t is in the view of the Tribunal entirely reasonable to interpret the terms of Article 1(a) without reading in a requirement that there must be no infraction of the host State's law in the course of the making of the investment, if the investment is to be within the scope of the Treaty protection."); *see also MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award dated 4 May 2016 ¶ 212 (CL-0015) ("The Tribunal does not find in the BIT a requirement that the investments have to have been made in accordance to the law of Montenegro"); *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 Nov. 2017 ¶¶ 319-320 (CL-0139) ("[T]he Tribunal may not import a requirement that limits its jurisdiction when such a limit is not specified by the parties.").

[981] Resp's C-M ¶¶ 188-194.

[982] DR-CAFTA, Art. 10.28 (CL-0001).

[983] Resp's C-M ¶ 189.

[984] *Id.* ¶ 192.

[985] *See* DR-CAFTA, Art. 10.28, n.10 (CL-0001) ("Whether a particular type of license, authorization, permit, or similar instrument . . . has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law.").

[986] *See Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 Nov. 2017, ¶ 319 (CL-0139) ("In this context, the following wording of Article 816 of the FTA is of particular relevance: 'Nothing in Article 803 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of covered investments, such as a requirement that investments be legally constituted under the laws or regulations of the Party, […].' Thus, Article 816 identifies the legality requirement as a 'special formality' that the host State is entitled to adopt if it so wishes. Since nowhere in the FTA or otherwise in the record is there an express or implied

329. In addition, Guatemala misconstrues *RDC v. Guatemala*, the sole case it relies upon in which a tribunal considered whether Article 10.28 contains an implied "legality" clause.[987] According to Guatemala, "[t]he RDC Tribunal when confronted with a definition of investment in the CAFTA-DR" and "[having] a chance to discuss Article 10.28(g)" observed that "'[i]t is to be expected that investments made in a country will meet the relevant legal requirements.'"[988] However, contrary to Guatemala's misleading characterization, the *RDC* tribunal expressly "agree[d] with Claimant" "that 'conferred pursuant to domestic law' is *not* a characteristic of the investment to qualify as such but a condition of its validity under domestic law."[989] The tribunal further added that "[e]ven if [the government agency's] actions with respect to [the claimant's investment] were *ultra vires* (not pursuant to domestic law), principles of fairness should prevent the government from raising violations of its own law as a jurisdictional defense when . . . [it] knowingly overlooked them and . . . endorsed an investment which was not in compliance with its law."[990]

330. Guatemala's references to *Inceysa v. El Salvador* and *Salini v. Morocco* are also misguided.[991] The *Inceysa* tribunal was interpreting the El Salvador-Spain BIT, which had an express "legality clause" in its "promotion and admission of investments" clause.[992] Similarly, the *Salini* tribunal was interpreting the Italy-Morocco BIT, which contained an express "legality clause."[993]

331. *Second*, even assuming *arguendo* that the Treaty contains a legality clause, Respondent's suggestion that *any* illegality, fraud or bad faith on the part of Claimants would deprive the Tribunal of jurisdiction or render Claimants' claims inadmissible is incorrect. As numerous arbitral tribunals and scholars have confirmed, a jurisdictional requirement concerning the legality of an investment or of a claimant's conduct applies only to the *establishment* of an investment, and not to any and all violations of the host State's law after an investment was made. In this regard, the tribunal in *Fraport v. Philippines* explained that "[i]f, at the time of the initiation of the investment, there has been

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provision of law to the effect that Peru made use of this option, it can only be concluded that there is no jurisdictional requirement that Claimant's investment was legally constituted under the laws of Peru.").

[987] Resp's C-M ¶ 190.

[988] *Id.* ¶ 190 (quoting *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, May 18, 2010 ¶ 140 (RL-0127)).

[989] *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, May 18, 2010 ¶ 140 (RL-0127) (emphasis added).

[990] *Id.* (internal quotation marks omitted).

[991] Resp's C-M ¶¶ 191, 193.

[992] *See* El Salvador-Spain BIT dated 14 Feb. 1995, Art. 2(1) (CL-0362) ("Each Contracting Party shall . . . admit these investments *in accordance with its legal provisions*.") (emphasis added).

[993] *See* Italy-Morocco BIT dated 18 July 1990, Art. 1(1) (CL-0363) ("the term 'investment' means all categories of property invested . . . *in accordance with the laws and regulations of that Party*.") (emphasis added).

compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defense to claimed substantive violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction."[994] The tribunal in *Metal-Tech v. Uzbekistan* similarly observed that the "legality" clause only "requires that the investment must be legal when it is initially established."[995]

332. None of the investment cases cited by Respondent supports its contrary position that any purported unlawful behavior *after* the establishment of an investment deprives the tribunal of jurisdiction or renders the claim inadmissible.[996] The secondary authorities cited by Respondent similarly acknowledge that any investor misconduct post-dating the making of the investment is irrelevant to the question of jurisdiction or admissibility.[997] Indeed, Respondent cites to an article by Arbitrator Douglas to argue that claims are inadmissible where "the investment *was procured* [i] by unlawful means such as by fraudulent misrepresentation or the [sic] corruption [ii] for an unlawful purpose such as to carry out a trade of counterfeited goods [iii] in breach of a provision of the treaty requiring approval by the authorities of the host State."[998] None of those situations remotely applies.

333. Here, Respondent fails even to allege – much less prove – any illegality in the making of Claimants' investment. Claimants made their investment when they first purchased shares in

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[994] *Fraport AG v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award dated 16 Aug. 2007 ¶ 345 (RL-0144) (annulled on other grounds).

[995] *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award dated 4 Oct. 2013 ¶ 193 (RL-0142) (holding that it would lack jurisdiction only where the investment was *made* unlawfully, notwithstanding that the definition of investment in the BIT provided that the investment must made *and implemented* in accordance with host State law).

[996] Resp's C-M ¶¶ 168-179; *see, e.g., Gustav F.W. Hamester GmbH v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award dated 18 June 2010 (RL-0139) ("An investment will not be protected *if it has been created* in violation of national or international principles of good faith, by way of corruption, fraud, or deceitful conduct, *or its creation* itself constitutes a misuse of the system …. It will also not be protected *if it is made* in violation of the host State's law.") (emphasis added) (quoted in Resp's C-M ¶ 166); *Inceysa Vallisoletana v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award dated 2 Aug. 2006 ¶ 237 (RL-0147) (dismissing claim where the claimant committed "violations of the fundamental rules of the bid that made it possible for Inceysa *to make the investment* that generated the present dispute") (emphasis added) (discussed at Resp's C-M ¶¶ 171-173). Respondent also devotes a paragraph to discussing the *Azinian v. Mexico* case, asserting that "Mexico challenged the tribunal's jurisdiction based on the claimants' alleged misrepresentations …," although there is no indication in the Award that Mexico raised any such jurisdictional objection, and neither was the case dismissed for lack of jurisdiction (it failed on the merits). *See Id.* ¶ 178; *Robert Azinian* et al. *v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award dated 1 Nov. 1999 (CL-0144).

[997] Resp's C-M ¶ 166, n. 261; Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, ICSID REV. , vol. 29, no. 1 (2014), at 185 (RL-0137) ("[T]here is a total consensus in the jurisprudence and it is a consensus that can be endorsed: any plea of illegality relating to the use of the assets comprising the investment by the foreign national must be considered as a defence to the merits of the claims"); Cameron A. Miles, *Corruption, Jurisdiction and Admissibility in International Investment Claims*, vol. 3 (2012) J INT'L DIS SET 329, 351ff., at 361 (RL-0138) ("As *Fraport* demonstrates, legality requirements are not concerned with investor misconduct post-dating the making of the investment.").

[998] Resp's C-M ¶ 168 (citing Zachary Douglas, "The Plea of Illegality in Investment Treaty Arbitration," ICSID REV., vol. 29, no. 1 (2014), p. 179 (RL-0137)).

Exmingua on 19 June 2009.[999] Not only does Guatemala not allege that this share purchase violated Guatemalan law in any respect, it concedes in its Counter-Memorial that Exmingua is lawfully constituted under Guatemalan law when it states that CGN and Minera San Rafael "are still Guatemalan entities, *properly organized under the laws of Guatemala*, like Oxec *and Exmingua*."[1000] Instead, all of Respondent's "illegality" allegations concern purported violations of Guatemalan laws that occurred *after* the establishment of Claimants' investment, including Exmingua's (i) alleged misrepresentations made in the Progreso VII EIA;[1001] (ii) purported lack of a valid construction permit;[1002] (iii) and various other alleged "violations of law," including operating the plant with a throughput above the purported EIA limit,[1003] committing infractions of the environmental laws, and failing to cease mining immediately after the November 2015 Guatemalan court decision.[1004]

334. More specifically, while Claimants made their investment in Guatemala in 2009 when they first acquired Exmingua shares and became Exmingua's controlling shareholders and, thereby, the indirect owners and beneficiaries of the exploration licenses held by Exmingua at that time, Exmingua did not submit its Progreso VII EIA to the MARN until 31 May 2010;[1005] did not begin construction until January 2012;[1006] could not have purportedly committed environmental infractions or allegedly operated in excess of any throughput restrictions until after it began operating in October 2014;[1007] and did not purportedly "carr[y] out illegal" "exploitation of natural resources" until December 2015.[1008] These alleged "violations" all occurred long after Claimants made their investment and, thus, even if true – which they are not – could not sustain a jurisdictional or admissibility objection.

335. Nor does the *Churchill Mining v. Indonesia*, on which Guatemala relies, assist it. Guatemala states that the *Churchill Mining* tribunal "held that claims arising from rights based on fraud or forgery which a claimant deliberately or unreasonably ignored are inadmissible" and concludes from this that "[f]ailure to conduct due diligence by an investor is a ground for rejecting its claim."[1009] As

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[999] Exmingua Shares Registry, Certificate no. 3 (C-0072).

[1000] Resp's C-M ¶ 259 (emphasis added).

[1001] *Id.* ¶¶ 200-207, 216.

[1002] *Id.* ¶¶ 208-214 and 216.

[1003] *Id.* ¶ 216.

[1004] *Id.* ¶¶ 216-218.

[1005] Progreso VII EIA dated 31 May 2010 (C-0082).

[1006] Clms' Mem. ¶ 39; Kappes I ¶ 57.

[1007] Daily Plant Summary Data for October 2014 – May 2016 (C-0125); Mining data for Guapinol South for the period between Nov. 2014 and Oct. 2015 (C-0123); Clms' Mem. ¶ 60; Kappes I ¶ 102.

[1008] Resp's C-M ¶ 355; *see also Id.* ¶ 216.

[1009] *Id.* ¶ 180.

shown, however, there is no allegation – much less evidence – that Claimants' claims arise from fraud or forgery; they clearly do not. Furthermore, it is not illegal to fail to conduct due diligence, and the jurisprudence does not suggest otherwise. Rather, in cases like *Churchill Mining* and *Alasdair Ross v. Costa Rica*, on which Guatemala also relies, the claimants' investments were made unlawfully.[1010] In both cases, the claimants argued ignorance of this fact, and the tribunals held that even if that could be an excuse (which was not decided), the claims remained inadmissible because of the illegality in the making of the investment, not because of any failure to conduct due diligence.[1011] Rather, the tribunals' discussions of due diligence in these cases are *dicta*.[1012]

336. Here, there is not even any allegation of illegality in the making of the investment. Claimants thus could not have "discovered" and avoided any illegality by conducting due diligence. In any event, Claimants did conduct appropriate due diligence before making their investment.[1013] There is absolutely no legal basis for Respondent's jurisdictional objection based on illegality.

b. Guatemala Has Failed To Prove Any Illegality By Claimants

337. Apart from the threshold defects with Respondent's objection shown above, Guatemala in any event has failed to substantiate its allegations of illegality.

338. *First*, Respondent makes the outlandish accusation that Claimants made fraudulent misrepresentations because "[t]he Claimants [sic] alleged that they prepared and submitted the EIA in

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[1010] *See Churchill Mining and Planet Mining Pty Ltd* v. *Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award dated 6 Dec. 2016 ¶¶ 510-511 (RL-0151) ("The facts established [] reveal the existence of a large scale fraudulent scheme implemented *to obtain* four coal mining concession areas. . . . ") (emphasis added); *Alasdair Ross Anderson* et al. *v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, ICSID Case No. ARB(AF)/07/3, Award dated 19 May 2010 ¶ 55 (RL-0153) ("[t]he fact that [Claimants] gained ownership of the asset in violation of the Organic Law of the Central Bank means that their ownership was not in accordance with the laws of Costa Rica and that therefore each of their deposits and resulting relationships with Villalobos did not constitute an 'investment' under the BIT.").

[1011] *See Churchill Mining and Planet Mining Pty Ltd* v. *Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award dated 6 Dec. 2016 ¶¶ 528-529 (RL-0151) ("[T]he Tribunal cannot but hold that all the claims before it are inadmissible. This conclusion derives from the facts … which demonstrate that the claims are based on documents forged to implement a fraud aimed at obtaining mining rights. . . . The inadmissibility applies to all the claims raised in this arbitration, *because* the entire EKCP project *is an illegal enterprise* affected by multiple forgeries and all claims relate to the EKCP.") (emphasis added); *Alasdair Ross Anderson* et al. *v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, ICSID Case No. ARB(AF)/07/3, Award dated 19 May 2010 ¶ 55 (RL-0153) ("The entire transaction . . . was illegal *because it violated the Organic Law* of the Central Bank. If the transaction by which the Villalobos acquired the deposit was illegal, it follows that the acquisition by each Claimant of the asset . . . also not in accordance with the law of Costa Rica.") (emphases added).

[1012] *See Churchill Mining and Planet Mining Pty Ltd* v. *Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award dated 6 Dec. 2016 ¶ 529 (RL-0151) ("The inadmissibility applies to all the claims . . . because the entire EKCP project is an illegal enterprise . . . This is *further supported* by the Claimants' lack of diligence . . . .") (emphasis added); *Alasdair Ross Anderson* et al. *v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, ICSID Case No. ARB(AF)/07/3, Award dated 19 May 2010 ¶ 55 (RL-0153) ("Costa Rica … has a fundamental interest in securing respect for its law. … *At the same time, prudent investment practice* requires that any investor exercise due diligence before committing funds to any particular investment proposal.") (emphasis added).

[1013] *See supra* Facts § II.B.2; Kappes II ¶¶ 14-21.

strict compliance with the [governing laws and regulations],"[1014] the EIA contained "specific promises … that they [sic] would conform to international environmental standards,"[1015] and "Exmingua authorities [sic] specifically signed a sworn statement in which they expressly committed to comply with Guatemala's environmental laws."[1016] Guatemala asserts that these were misrepresentations because "[t]he problems with the EIA are evident"[1017] and because "[i]nternational specialists" – that is, Mr. Robinson and Dr. Moran (as echoed by SLR) – "unanimously concluded that all licenses granted to Exmingua should be suspended, because the EIA lacked fundamental studies of groundwater and surface water, and misrepresented the negative environmental effects of the projects."[1018]

339. As an initial matter, these purported "deficiencies"[1019] do not constitute "illegalities." In fact, Guatemala does not even purport to indicate what laws allegedly were violated by Exmingua (much less by *Claimants*) in submitting this allegedly deficient EIA. In any event, Guatemala's complaint is absurd, because, as Claimants have explained, Exmingua and its consultant, GSM, conducted comprehensive environmental assessments, *which the MARN approved*.[1020] The EIA spanned over *900 pages* and included a detailed description of the physical, biological, socioeconomic, and cultural environment (including substantial geological and hydrological studies), Exmingua's activities, the Project's environmental impacts, and a comprehensive environmental management plan.[1021] The MARN's DIGARN conducted a comprehensive review of the EIA, and requested supplemental information (which Exmingua provided).[1022] If the EIA was deficient in any respect – which it was not – Guatemala's recourse was to reject and not approve it.

340. Apparently alert to this inconvenient – and fatal – fact, Guatemala twists reality and contends that Exmingua made "misrepresentations" in its EIA about the mine's impact on the environment and

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[1014] Resp's C-M ¶ 205.

[1015] *Id.* ¶ 204.

[1016] *Id.* ¶ 204.

[1017] *Id.* ¶ 206.

[1018] *Id.* ¶ 206; Press release, Publication of a condemnatory report on the mine in San José del Golfo, Guatemalan Commission on Human Rights dated 22 Feb. 2013 (R-0111); Press release, Guatemalan Human Rights Commission, El Tambor mine license should be suspended dated 15 Feb. 2013 (R-0050); Report by Dr. Robert Moran dated 22 May 2014 (R-0051).

[1019] Resp's C-M ¶¶ 64, 738, 754.

[1020] *See supra* § II.B.1; MARN Resolution No. 1010-2011 dated 23 May 2011, at 5 (C-0212).

[1021] *See supra* § II.B.1; Progreso VII EIA (C-0082).

[1022] *See supra* § II.B.1; Request for amendments to the Progreso VII EIA dated 22 Mar. 2011 (C-0087); Amendment to the Progreso VII EIA dated 1 Apr. 2011 (C-0089).

compliance with international standards.[1023] Guatemala, however, hoists itself on its own petard by simultaneously insisting that these deficiencies were "evident";[1024] if the EIA, in fact, was so "evidently" deficient, then it would have been rejected by the MARN specialists who reviewed and approved it. Respondent fails to explain how it has only identified these "evident" deficiencies in this Arbitration, a decade after the EIA was approved.

341. As shown, moreover, far from being "independent," the "specialists" who criticized the EIA were engaged by NGOs ideologically opposed to mining to write critical reports about the EIAs for the four foreign-owned mining projects that already had been approved.[1025] In any event, the alleged "misrepresentations" are hortatory and cannot give rise to any claim, *e.g.*, that Exmingua's "activities 'will be planned and executed with the [highest] standards of environmental and social management,'" and that Exmingua "will strive to develop the project 'in a responsible way both in the environmental and social field.'"[1026] Not only has Respondent failed to prove that Exmingua violated any law regarding environmental or social obligations, but any subsequent violation would not render these earlier statements actionable misrepresentations.

342. *Second*, apart from occurring well after the making of Claimants' investment and not implicating *Claimants* in any wrongdoing, Respondent's assertion that Exmingua violated the Municipal Code by constructing the mine without a valid construction permit from the Municipality of San Pedro Ayampuc[1027] is groundless and merely exposes the discriminatory, arbitrary, and unlawful conduct of Guatemala's municipal and judicial organs. In support its accusations, Respondent refers to a Guatemalan court decision and municipal records,[1028] and baselessly asserts, without any evidence, that Exmingua's documents confirming the existence of a valid permit are forged.[1029]

[1023] Resp's C-M ¶¶ 734-754.

[1024] *Id.* ¶ 206.

[1025] Program of International Seminar on "Extractive Industries and Sustainable Development?" dated 7 Apr. 2016, at 6 (C-0820). As detailed above, Guatemala's mining experts in this arbitration have no expertise in environmental science and merely repeat the conclusions set forth by Dr. Moran and Mr. Robinson in their reports and state that they agree with those conclusions, without offering any independent analysis of any of the issues. *See supra* § II.B.1.

[1026] Resp's C-M ¶¶ 734-735.

[1027] *See Id.* ¶¶ 208-214.

[1028] Judgment of the Third Civil Court of First Instance of Guatemala, issued on 13 July 2015, Exp. 01050-2014-00871 (R-0064); Certificate issued by the Mayor of the Municipality of San Pedro Ayampuc dated 23 Mar. 2012 (R-0115); Report of the Municipality of San Pedro Ayampuc dated 20 Nov. 2020 (R-0116).

[1029] MARN Technical Report dated 23-27 Feb. 2015 (R-0105).

343. However, as Claimants explained, after Exmingua obtained approval of its EIA and secured an exploitation license for Progreso VII, it applied to the Municipality of San Pedro Ayampuc on 8 November 2011 for a construction permit.[1030] A few days later, on 15 November 2011, it was granted the permit.[1031] This is evidenced by the Minutes of the meeting of the Municipal Council of San Pedro Ayampuc, which record the Council's approval of the permit's issuance as well as proof of Exmingua's payment of the permit fee.[1032] In addition, as Mr. Kappes observes, "the construction works were carried out at the site, in plain sight and using heavy construction equipment, between January and March 2012, and then from mid-2014 until late 2014. At no point during that time did the Mayor or any other official from the Municipality of San Pedro Ayampuc raise any complaints about Exmingua's construction or make any claim that Exmingua was engaged in construction without a permit."[1033] Rather, it was only in late 2014, when the auxiliary mayors of two villages within the Municipality of San Pedro Ayampuc (but not the Municipality's Mayor) applied for an *amparo*, that the false claim was raised that Exmingua had never been granted a construction permit.[1034]

344. The subsequent proceedings, in which CALAS intervened as an interested third-party mere weeks after the Supreme Court had suspended CALAS' amparo proceedings against the MEM,[1035] were plagued with irregularities. In particular, despite Exmingua having produced the certification of the minutes of the Municipal Council and the receipt for payment of the construction fee, the Municipality of San Pedro Ayampuc submitted to the Court a different extract of minutes of a Municipal Council meeting, which did not contain any mention of granting Exmingua a construction permit.[1036] In a judgment devoid of analysis, the Court concluded, in a single sentence, that "the contradiction between the related minutes is more than obvious and as a result, the mining entity does not have a construction permit."[1037] The judgment, moreover, lacked any challenge by the

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[1030] *See supra* § II.C.1; Clms' Mem. ¶ 39; Kappes I ¶ 56; Application by Exmingua for a construction permit dated 8 Nov. 2011 (C-0091).

[1031] *See supra* § II.C.1; Clms' Mem. ¶ 39; Kappes I ¶ 56; Construction permit dated 15 Nov. 2011 (C-0092).

[1032] Application by Exmingua for a construction permit dated 8 Nov. 2011 (C-0091); Construction permit - Minutes of the San Pedro Ayampuc Municipal Council meeting dated 15 Nov. 2011 (C-0092); Fee payment for the construction permit dated 21 Dec. 2011 (C-0093).

[1033] Kappes II ¶ 31; *see also supra* § II.C.1.

[1034] *See supra* § II.C.1; Kappes II ¶ 32.

[1035] *See supra* § II.C.1; Supreme Court Ruling dated 5 Sept. 2014 (C-0466).

[1036] *See supra* § II.C.1.

[1037] Judgment dated 13 July 2015, issued in Case No. 01050-2014-00871 by the Third Civil Court of First Instance of Guatemala, p. 28 [p. 13 ENG] (R-0064); *see also supra* § II.C.1.

Municipality to the authenticity of the permit fee payment receipt, nor does it reflect any consideration by the Court of its evidentiary weight.[1038]

345. Further, although the Municipality represented in *November 2020* that it was unable to locate in its files any record of the grant of a construction permit to Exmingua, on *27 January 2021*, the Municipality certified that it had received payment of the fee for the construction permit on 21 December 2011, confirming Exmingua's account.[1039] Guatemala, moreover, fails to acknowledge – much less explain – how the MARN's statement in its February 2015 Technical Report confirming that Exmingua had obtained all necessary "permits, authorizations, or licences," and, specifically, that Exmingua "ha[d] [a] . . . Construction license granted by the municipalities of San Pedro Ayampuc and San Jose del Golfo"[1040] is consistent with the fiction it is now advancing in this Arbitration.

346. Respondent also has not provided any evidence of the purported "forgery"[1041] it now alleges, nor did the Municipal Court make any such finding. The Constitutional Court, in turn, refused to even rule on the issue, and struck down the lower Court's order to refer the matter to the Public Prosecutor's Office for a criminal investigation.[1042]

347. *Third*, Respondent's potpourri of remaining allegations regarding Claimants' purported consistent violations of Guatemalan law[1043] are similarly unfounded and unsubstantiated. Guatemala, in this regard, takes issue with the processing plant's throughput rate, stating that "Claimants made clear to regulators that they envisioned a mine operating at 150 tpd"[1044] and that "Exmingua was not authorized to mine in excess of 150 tpd."[1045] Guatemala further contends that "the audit conducted by the MARN shows that Exmingua was seriously and substantially out of compliance with the EIA and Environmental Management Plan (EMP) approvals and conditions."[1046] In addition, Respondent complains that Exmingua "failed to comply with the Provisional Amparo Decision issued by the

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[1038] *See supra* § II.C.1.
[1039] *Id.*
[1040] MARN Technical Report dated 23-27 Feb. 2015, at 7, 63 (R-0105).
[1041] Resp's C-M ¶ 216.
[1042] *See supra* § II.C.1; Fuentes II ¶ 27.
[1043] Resp's C-M ¶¶ 207, 215-216; *see also Id.* ¶¶ 736, 754.
[1044] Resp's C-M ¶ 736.
[1045] *Id.* ¶ 807.
[1046] *Id.* ¶ 207.

Supreme Court" and that "any exploitation after December 1, 2020 [when Exmingua received notice of the Decision] constitutes an illegal exploitation of natural resources."[1047] All of these claims fail.

348. With regard to the plant's processing capacity, as noted, the EIA refers to a *nominal* throughput of 150 tpd, and a *design* throughput of 200 tpd.[1048] As SRK explains, "nominal" denotes typical performance and "design" incorporates an operating margin to allow for orebody variability and process disturbances.[1049] Moreover, the MARN and the MEM *repeatedly acknowledged* during their inspections that Exmingua was processing in excess of 150 tons of ore per day – *e.g.*, that the mine was "removing from 200 to 250 tons of ore,"[1050] "processing 200 tons daily,"[1051] and that the plant "is [] fed [] 240 tpd" and is "in operation with a daily feed of 240 tons of ore"[1052] – without criticizing it, fining Exmingua, or recommending any changes to the plant's processing rate.[1053] There was no violation and Guatemala is estopped from now claiming otherwise.

349. Guatemala's accusation of environmental violations is likewise meritless. In fact, Respondent's assertion that a MARN audit showed substantial non-compliance is not even supported with a citation to any document.[1054] In any event, as Claimants explained, Exmingua took its environmental obligations seriously and, shortly after beginning construction in 2012, it employed a sixteen-person team and four independent contractors – including the founder of the Center for Environmental Studies at *Universidad del Valle de Guatemala* and the 2007 recipient of the Presidential Medal for the Environment – to ensure its environmental compliance.[1055] Exmingua also retained ARNC – an environmental firm registered with the MARN – to monitor the water and air quality, as well as noise pollution, around the Project site, which determined Exmingua was in compliance.[1056]

[1047] *Id.* ¶ 216.

[1048] *See supra* § II.C.4.

[1049] SRK II ¶ 50; *see also* Kappes II ¶ 68; *supra* § II.C.4.

[1050] MEM 2015 February Inspection, at 5, 11, 19 (C-0627); *see also supra* § II.C.4.

[1051] MEM 2015 February Inspection, at 5, 11, 19 (C-0627); *see also supra* § II.C.4.

[1052] MEM 2015 November Inspection, at 6, 10, 23 (C-0628); MARN 2015 November Inspection, at 3 (C-0629); *see also supra* § II.C.4.

[1053] *See supra* § II.C.4.

[1054] *See* Resp's C-M ¶ 207.

[1055] *See supra* § II.B.2; Kappes I ¶¶ 57-58; Kappes II ¶ 34; Contract for the Environmental Impact Study for Santa Margarita Derivada, attaching the Economic Technical Proposal dated 23 June 2009, at 21 (C-0079); Santa Margarita EIA, at 21-22 (C-0081); Progreso VII EIA, at 49 (C-0082).

[1056] *See supra* § II.B.2; ARNC Report on the Water and Air Monitoring for the Second Trimester dated July 2014, at 28, 77 (C-0844); ARNC Report on Quality of Air and Water in July-September 2014 dated Oct. 2014, at 29, 66 and 88 (C-0845).

350. Further, as Claimants explained, the February 2015 MARN and MEM inspections on which Guatemala relies resulted in findings not uncommon for an initial inspection post-operation.[1057] Guatemala, moreover, is misleadingly silent about the ensuing inspections in November 2015, which noted that Exmingua had addressed nearly all of the issues, with the MARN and the MEM noting just six and four remaining action items, respectively.[1058] Further, contrary to Guatemala's assertion that the MARN "commenced administrative proceedings against Exmingua" arising from environmental non-compliance, Guatemala offers in support a one page document[1059] clearly created by the MARN to paper its regulatory oversight of Exmingua in light of the then-ongoing court proceedings.[1060] No hearing in this alleged administrative proceeding was ever held and Exmingua was never issued any fine or other sanction for any allegedly environmental non-compliance.[1061]

351. Finally, Guatemala's assertion that Exmingua operated unlawfully after 1 December 2020[1062] is wrong. Exmingua was not a party to the Supreme Court case that resulted in the *amparo provisional*, and, thus, the Court did not issue any ruling that had direct effect on Exmingua.[1063] The MEM, moreover, did not issue its suspension order until 10 March 2016.[1064] There is thus no ground for asserting that Exmingua operated unlawfully between December 2015 and March 2016. As for Exmingua's operations between March and May 2016, the MEM issued a fine.[1065] Even assuming *arguendo* that Exmingua committed an infraction for operating during this two-month period, such a minor violation could not have any effect on Claimants' claim.[1066] Whether the indefinite suspension

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[1057] *See supra* § II.C.2; MARN Technical Report dated 23-27 Feb. 2015 (R-0105); MEM Report on Inspection of 23-27 Feb. 2015 dated 12 Mar. 2015 (C-0627).

[1058] *See supra* § II.B.2; MARN Report on Inspection of 26 Nov. 2015 at 21 (C-0629); MEM Report from 26 Nov. 2015 Inspection, at 26 (C-0628).

[1059] MARN Document No. 475-2016/DCL/EOGP/mirf dated 24 Feb. 2016 (R-0187).

[1060] *See supra* § II.B.2.

[1061] Resp's C-M ¶ 769.

[1062] *Id.* ¶ 216.

[1063] Fuentes I ¶¶ 89-96; Application by CALAS for *amparo nuevo* dated 29 Aug. 2014 (C-0137-SPA/ENG).

[1064] *See supra* § II.D.2.

[1065] MEM, Resolution No. 384 dated 16 Nov. 2016, at 3 (C-0904).

[1066] Even when the violation is *at the time of the making of the investment*, minor infractions cannot divest a tribunal of jurisdiction. *See, e.g.*, *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award dated 30 Nov. 2017 ¶ 332 (CL-0139) ("Where the allegedly unlawful conduct is minor, procedural, or a good faith error, the investor may still benefit from treaty protections and the tribunal may consider the substantive merits of the case. Only grave violations of national law which were decisive to the host State's decision to allow the investment may justify a finding of inadmissibility."); *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction dated 29 Apr. 2004 ¶ 86 (CL-0017) (holding that "to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty."); *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award dated 6 Feb. 2008 (CL-0216) ¶ 116 (quoting Fraport v. Philippines I "[w]hen the question is whether the investment is made in accordance with the law of the host state, considerable arguments may be made in favour of construing jurisdiction ratione materiae in a more liberal way which is generous to the investor. In some circumstances, the law in question of the host state may not be entirely clear and mistakes may be made in good faith").

of Exmingua's license comports with Guatemala's Treaty obligations, moreover, is the very subject of this dispute, and any alleged non-compliance with the challenged measure cannot give rise to the dismissal of a treaty claim.

2. Claimants' Full Protection And Security Objection Is Not Time-Barred

352. As Claimants explained during the preliminary objections phase of this proceeding, their full protection and security ("FPS") claim is not based on a single continuing breach, nor does it arise out of events that occurred in 2012.[1067] Rather, Claimants' FPS claim concerns Respondent's specific failure to provide FPS in connection with protests and blockades that erupted in early 2016, nearly two years after Exmingua's mining operations had commenced, and thus is timely.[1068] As Claimants further explained, this is because, for purposes of assessing the timeliness of a claim, it is "possible and appropriate . . . to separate a series of events into distinct components,"[1069] and tribunals can take into account pre-critical date measures as factual background and context, without running afoul of the Treaty's limitation period.[1070]

353. In addition, Claimants explained that they do not allege any breach and are not seeking any damages in respect of the delay caused by the 2012 protests to the start of mining activities.[1071] Claimants further explained that, even if the relevant protests for purposes of the time-bar were deemed to have begun in 2012, the claim still would not be barred, because the prescription period only begins to run from the date a continuous breach ceases,[1072] and, in any event, the limitations period was renewed by the continuing breaches that occurred in 2016 and thereafter.[1073]

354. It its Decision on Preliminary Objections, the Tribunal accepted that Claimants were not seeking damages for a breach of FPS arising out of the delay to exploitation activities at the Progreso VII site.[1074] The Tribunal then observed that the jurisdictional issue requires factual investigation concerning, in particular, "any relevant blockades, any relevant site access notwithstanding the

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[1067] Claimants' Preliminary Objections Counter-Memorial ("Clms' PO C-M") ¶¶ 116-128; Claimants' Preliminary Objections Rejoinder ("Clms' PO Rej.") ¶¶ 136-144; *see also* Decision on Preliminary Objections ¶¶ 210-214.

[1068] Clms' PO C-M ¶¶ 116-128; Clms' PO Rej. ¶¶ 136-144; *see also* Decision on Preliminary Objections ¶¶ 210-214.

[1069] Clms' PO C-M ¶ 107 (quoting *Clayton*, Award on Jurisdiction, ¶¶ 266-269 (CL-0088)); Clms' PO Rej. ¶ 145.

[1070] Clms' PO C-M ¶ 109 (citing *Eli Lilly*, ¶ 172 (RL-0040), *Mondev*, ¶ 70 (RL-0018)); Clms' PO Rej. ¶ 145.

[1071] Clms' PO C-M ¶¶ 116-128; Clms' PO Rej. ¶¶ 136-144; *see also* Decision on Preliminary Objections ¶¶ 210-214.

[1072] Clms' PO C-M ¶¶ 110-112 (citing *Mobil*, ¶ 155 (CL-0090); *UPS*, ¶ 30 (CL-0037); and *Nissan*, ¶¶ 57, 285, 329 (CL-0078); Clms' PO Rej. ¶¶ 136-144; *see also* Decision on Preliminary Objections ¶¶ 210-214.

[1073] Clms' PO C-M ¶¶ 113-115, 128 (citing *UPS v. Canada*, Award on the Merits ¶ 28 (CL-0037)); Clms' PO Rej. ¶ 145.

[1074] Decision on Preliminary Objections ¶ 228.

blockades, and any relevant appeals for State assistance."[1075] In addition, the Tribunal observed that an additional relevant inquiry is whether the post-2016 events "involved new State actions or omissions, or merely continuations of (or effects emanating from) prior State actions or omissions."[1076] The Tribunal thus invited the Parties to "return to these legal issues in their subsequent memorials, in the context of the fuller evidentiary record."[1077]

355. In its Counter-Memorial, Guatemala renews its objection to the Tribunal's jurisdiction over Claimants' FPS claim.[1078] Guatemala asserts that DR-CAFTA Article 10.18.1 bars claims filed three years after the claimant "first acquired" knowledge of breach or loss[1079] and that "[a] breach arising from a continuous course of conduct does not change this principle," relying for support on *Corona Materials v. Dominican Republic*, *Berkowitz v. Costa Rica*, and *Ansung v. China*.[1080] In addition, relying on *Mondev v. United States*, Guatemala asserts that "an ongoing effect of a measure [cannot] preset the limitation period."[1081] Guatemala then concludes that Claimants' FPS claim is barred because Claimants "first acquired" knowledge of the events giving rise to their claim in 2012, "even if Claimants' inability to conduct the EIA is seen as an effect felt in 2016."[1082] Guatemala further contends that Claimants' claim regarding the 2016 protests "lacks evidentiary support" and that "there is absolutely no evidence that shows that such protests occurred."[1083] As demonstrated below, Guatemala's renewed objection is baseless.

356. *First*, contrary to Respondent's assertion, Claimants' claim does not run afoul of Article 10.18.1's three-year prescription period.[1084] In so arguing, Respondent ignores Claimants' principal position in respect of its FPS claim, which is that the events giving rise to the breach *began* in 2016 –

[1075] *Id.* ¶ 226.

[1076] *Id.* ¶ 226.

[1077] *Id.* ¶ 227.

[1078] Resp's C-M ¶¶ 226-254. Guatemala's accusation that Claimants have "attempt[ed] to deceive Guatemala and this Tribunal" by raising a "new claim for full protection and security" – arising out of Claimants' inability to use the "mine laboratory for other projects" – that is "inadmissible" because Claimants do not claim "separate damage as a result of the subsequent protests and blockade at the Progreso VII since Exmingua's exploitation licence was suspended" is yet another hyperbolic inaccuracy. Resp's C-M ¶¶ 221-225. Claimants observed in their Memorial that the blockades prevented Exmingua from using its on-site laboratory facilities – or entering the site at all – which was its right. Clms' Mem. ¶ 258; *see also* Fuentes I ¶ 71. As Guatemala itself notes, Claimants do not claim any damage as a result of this violation, and therefore have not made any separate claim in this respect. As for Respondent's argument that Claimants have not made a *prima facie* case for lack of full protection and security (Resp's C-M ¶¶ 247-251), *see infra* § III.D.

[1079] Resp's C-M ¶¶ 226-235.

[1080] *Id.* ¶¶ 229-234.

[1081] *Id.* ¶ 235.

[1082] *Id.* ¶¶ 239-244.

[1083] *Id.* ¶¶ 245, 249-250.

[1084] *See Id.* ¶¶ 226-238.

as a distinct and fundamentally different series of protests that erupted after the Guatemalan Supreme Court's decision to grant an *amparo* against the MEM and the MEM's initial refusal to suspend Exmingua's license in response to that ruling.

357. *Second*, Guatemala's assertion that a continuous course of conduct cannot alter the critical date for purposes of a claim under DR-CAFTA Article 10.18.1 is wrong. The cases that Guatemala relies upon for this assertion all involved a singular measure, which gave rise to a breach and damage outside of the limitations period, and thus are inapposite. In *Corona Materials v. Dominican Republic*, for instance, the challenge concerned the Environment Ministry's refusal to grant a license, an act which occurred prior to the critical date.[1085] The tribunal rejected the claimant's argument that the respondent's failure to reconsider its license application was "an autonomous breach," finding that it did not produce "any separate effects on its investment other than those that were already produced by the initial decision."[1086] Likewise, in *Berkowitz v. Costa Rica*, the tribunal dismissed the claimants' argument that the respondent's failure to provide prompt and adequate compensation for the expropriation of claimants' residential properties were "continuing breaches," because they were not "independently actionable" and "separable" from "the pre-entry into force conduct in which they are deeply rooted," which was the issuance of an expropriation decree.[1087]

358. Further, in *Ansung v. China*, the claimant challenged the respondent's conduct in relation to its investment in a project for the construction of a golf course and condominiums, including the respondent's failure to enjoin the illegal operation of a nearby golf course and increasing the agreed price for the land use rights.[1088] The claimant argued that its claim had crystallized "only after its expectation and plan for the 27-hole golf course was completely frustrated," which it alleged occurred after the cut-off date due to the State's failure to provide the additional land for the second phase of the project and the actual sale of its shares in the investment.[1089] The tribunal, however, concluded that it was clear from the claimant's pleadings that the claimant's claim had crystallized prior to the cut-off date, when the claimant made the decision "to dispose of its entire" investment "in order to avoid further losses."[1090] The tribunal thus concluded that this was the date that the claimant first

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[1085] *Corona v. Dominican Republic*, Award on the Respondent's Expedited Preliminary Objections ¶¶ 219, 237 (RL-0002).

[1086] *Corona v. Dominican Republic*, Award on the Respondent's Expedited Preliminary Objections ¶ 212 (RL- 0002).

[1087] *Aaron C. Berkowitz., et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) dated 30 May 2017, ¶¶ 252, 264 (RL-0038); see also Id. ¶¶ 270, 286 (holding that other claims were not time barred).

[1088] *Ansung Housing Co., Ltd v. People's Republic of China*, ICSID Case No. ARB/14/25, Award dated 9 Mar. 2017 ¶¶ 44, 46 (RL-0103).

[1089] *Id.* ¶ 93.

[1090] *Id.* ¶ 107.

acquired knowledge of the fact that it had incurred loss or damage, and the additional conduct or inaction that the claimant sought to rely on after the cut-off date did not result in new damage or loss separate from that which had already been incurred.[1091] The facts of these cases bear no resemblance to the facts here.

359. In contrast, and consistent with the facts here, *Grand River v. United States* involved a challenge to a master settlement agreement, which had been concluded more than three years before arbitration commenced, as well as a challenge to a statutory obligation to place funds into escrow, which was enacted within the three-year period.[1092] The tribunal determined that the challenge to the master settlement agreement was time-barred, whereas the challenge to the statutory obligation was not, despite the fact that the escrow statutes were contemplated by and enacted pursuant to the time-barred agreement.[1093] As the *Grand River* tribunal emphasized, the prescription period should not be "interpreted to bar consideration of the merits of properly presented claims challenging [separate State action] within three years of the filing of the claim and that allegedly caused significant injury, even if those provisions are related to earlier events."[1094] It is this principle which applies here.

360. *Third*, Guatemala's assertion that an ongoing effect of a measure cannot reset the limitations period under DR-CAFTA Article 10.18.1 is incorrect. Although Guatemala relies on *Mondev v. United States* in this regard,[1095] the *Mondev* tribunal observed that "events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation,"[1096] which supports Claimants' position that a factual predicate to a claim is distinct from the occurrence of the breach and the incurrence of a loss arising out of such breach.

[1091] *Id.* ¶¶ 109-110.

[1092] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA, UNCITRAL, Decision on Objections to Jurisdiction dated 20 July 2006 ("*Grand River v. United States*, Decision on Objections to Jurisdiction") ¶¶ 81-87 (RL-0039).

[1093] *Id.* ¶ ¶¶ 81-87.

[1094] *Id.* ¶¶ 86-87; *see also William Ralph Clayton and others v. Government of Canada*, NAFTA, UNCITRAL, Award on Jurisdiction and Liability dated 17 Mar. 2015 ("Clayton v. Canada, Award on Jurisdiction and Liability") ¶¶ 266-269 (CL-0088) (observing that for purposes of assessing the timeliness of a claim, it is "possible and appropriate … to separate a series of evens into distinct components . . . ."); The *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Preliminary Objection, Judgment dated 4 Apr. 1939, PCIJ Series A/B No. 77 ¶ 87 (CL-0089) ("It is true that a dispute may presuppose the existence of some prior situation or fact, but it does not follow that the dispute arises in regard to that situation or fact. . . . it is the subsequent acts [falling within the Court's jurisdiction] which form the centre point of the argument and must be regarded as constituting the facts with regard to which the dispute arose.").

[1095] *See* Resp's C-M ¶ 235.

[1096] *Mondev v. United States*, Final Award ¶ 70 (RL-0018).

361. In any event, Guatemala's position also fails to accord with the decisions of tribunals and other international courts. In *UPS v. Canada*, for example, the NAFTA tribunal interpreting the same prescription period that is present in the DR-CAFTA acknowledged that "continuing courses of conduct constitute breaches of legal obligations and renew the limitation period accordingly."[1097] The tribunal explained that "[t]he use of the term 'first acquired' is not to the contrary, as that logically would mean that knowledge of the allegedly offending conduct plus knowledge of loss triggers the time limitation period, even if the investor later acquire[d] further information confirming the conduct or allowing more precise computation of loss."[1098] Similarly, the tribunal in *Feldman v. Mexico* accepted the claimant's claim for lost profits during a period after the entry into force of the NAFTA, even though the claim related to measures adopted by Mexico before the entry into force of the treaty.[1099] As the tribunal observed, "if there has been a permanent course of action by Respondent which started before January 1, 1994 [*i.e.*, the date of the NAFTA's entry into force] and went on after that date and which, therefore, 'became breaches' of NAFTA Chapter Eleven . . . that post-January 1, 1994 part of Respondent' alleged activity *is* subject to the Tribunal's jurisdiction."[1100] This accords with international law, as applied by other international courts.[1101]

[1097] *UPS v. Canada*, Award on the Merits ¶ 28 (CL-0037).

[1098] *Id.*

[1099] *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/99/1, Award on the Merits dated 16 Dec. 2002 ¶ 199 (CL-0093); *see also Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues dated 6 Dec. 2000 ("*Marvin Roy v. Mexico*, Award on Jurisdiction") ¶ 43 (CL-0094).

[1100] *Marvin Roy v. Mexico*, Award on Jurisdiction ¶ 62 (CL-0094) (emphasis in original).

[1101] *See, e.g.*, *Agrotexim Hellas S.A. and Others v. Greece*, Commission decision dated 12 Feb. 1992 ("Agrotexim v. Greece, Commission decision"), DR 72, at 5, 9 (CL-0095) (holding that "the applicants' complaints relate to a continuing situation and that in such circumstances the six months period runs from the termination of the situation concerned."); *Varnava and Others v. Turkey*, Grand Chamber, Appl. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment dated 18 Sep. 2009, ECHR 2009 ¶ 159 (CL-0096) ("Nonetheless, it has been said that the six-month time-limit does not apply as such to continuing situations (citations omitted); this is because, if there is a situation of ongoing breach, the time-limit in effect starts afresh each day and it is only once the situation ceases that the final period of six months will run to its end"); *Cone v. Romania*, ECtHR (app no. 35935/02), Judgment dated 24 June 2008, ¶ 22 (CL-0097-FR/ENG) ("[W]hen the alleged violation consists of a continuous situation, the six-month period only begins as from the point in time when the continuous situation ends") (citations omitted); Council of Europe/Conseil De L'Europe, Yearbook of the European Convention on Human Rights/Annuaire de la Convention Europeenne des Droits de L'homme, vol. 34 (1991), on *De Becker v. Belgium*, ECHR Appl. No. 214/56 (9 June 1958), at 244 (CL-0098) ("[W]hen the Commission receives an application concerning ... a permanent state of affairs ... the problem of the six months period specified in Article 26 can arise only after this state of affairs has ceased to exist; whereas in the circumstances, it is exactly as though the alleged violation was being repeated daily thus preventing the running of the six months period"); *McDaid and others v. the United Kingdom*, ECHR Appl. No. 25681/94 dated 9 Apr. 1996, at 5 (CL-0099) ("Insofar as the applicants complain that they are victims of a continuing violation to which the six month period is inapplicable, the Commission recalls that the concept of a 'continuing situation' refers to a state of affairs which operates by continuous activities by or on the part of the State to render the applicants victims.").

362. Although Guatemala argues that the *UPS* approach has been criticized, as Claimants have shown, it also has been endorsed. Notably, only two of the DR-CAFTA Parties have expressed disagreement with the *UPS* and *Feldman* tribunals in their NDP submissions.[1102]

363. In light of the principles set forth above, Respondent's jurisdictional objection fails, because Claimants have provided substantial evidence that their FPS claim arises from Respondent's failure to protect Claimants' investments from protests and blockades that began in early 2016.[1103] Indeed, the 2016 protests are fundamentally distinct from the 2012 protests, which caused a two-year delay to Exmingua's operations, but which ended in May 2014 when Guatemala's national police broke through the blockade and evicted the protesters from the site.[1104] Whereas the 2012 protests were aimed at preventing *construction and operation* of the mine following issuance of Exmingua's exploitation license (and thus sought to *prevent Exmingua from operating*),[1105] the 2016 protests arose from the Guatemalan Supreme Court *granting an amparo* against the MEM, on 11 November 2015, and ordering suspension of the exploitation license (and thus sought to *compel the MEM to take action*).[1106] The similarity in the type of action or omission that may give rise to more than one breach at different points in time cannot justify conflating those disparate breaches.

364. The distinction between the protests that commenced in 2012 and those that erupted in 2016 and the separate harm that arose out of each is borne out by Guatemala's own characterization of the 2012 protests, which it describes as being "in opposition to Exmingua's efforts [to begin mining] . . . cit[ing] environmental concerns . . . with the *highest concern* being to ensure that the mining activities would not contaminate their water."[1107] In contrast, the evidence reflects that the 2016 protests (which Guatemala denies even took place)[1108] arose out of a distinct factual matrix related to the Supreme Court's granting of an *amparo*, which the MEM opposed, and the MEM's subsequent refusal to suspend Exmingua's license as ordered by the Court.[1109]

[1102] *See* Resp's PO Reply ¶ 78; US NDP Submission dated 19 Feb. 2021 ¶¶ 2-6; Costa Rica NDP Submission dated 19 Feb. 2021 ¶¶ 4-18.

[1103] *See supra* § II.D.3; *see also* Clms' Mem. ¶ 118; Kappes I ¶ 139; Kappes II ¶ 75.

[1104] Clms' Mem. ¶¶ 40-53; Kappes I ¶¶ 63-92.

[1105] Clms' Mem. ¶¶ 40-53; Kappes I ¶¶ 63-92.

[1106] *See supra* § II.D.3; s*ee also* Clms' Mem. ¶¶ 117-118; Kappes I ¶ 138; Kappes II ¶ 75.

[1107] Resp's C-M ¶¶ 711-712 (emphasis added).

[1108] *Id.* ¶ 250.

[1109] *See* Maria Rosa Bolaños, "The MEM will not suspend the project," *La Prensa Libre*, 1 Mar. 2016 (C-0006); Natiana Gándara, "CIG urges the MEM to not bend over pressure," *La Prensa Libre*, 11 Mar. 2016 (C-0007); Geovani Contreras, "Locals from La Puya continue with the protests," *La Prensa Libre*, 13 Mar. 2016 (C-0009); Jerson Ramos and Jose Rosales, "Protesters of La Puya burn doll of the Minister of Energy," *La Prensa Libre*, 26 Mar. 2016 (C-0010); Nelton Rivera, "The new camp at the peaceful resistance La Puya," *Prensa Comunitaria Km.* 169, 19 May 2019 (C-0011).

365. In particular, as Claimants have explained, following the Supreme Court's 11 November 2015 order, the MEM refused to enforce the Supreme Court's ruling, asserting that it lacked "substance," that the license had been granted in 2011 and had not been challenged at that time, and that the granting of the license thus had been consummated.[1110] The MEM also filed a petition before the Supreme Court requesting clarification as to what actions it was required to take in light of the ruling.[1111]

366. Following the Supreme Court's ruling, in January 2016, Madre Selva, in coordination with CALAS, commenced protests that occurred nearly every day from 21 January 2016 until at least 30 April 2018, at both the MEM's offices *and* at the Project site.[1112] As CALAS' letter to the Government demonstrates, these protests were in direct response to the MEM's refusal to suspend Exmingua's exploitation license. In its 7 March 2016 letter, CALAS writes that "demonstrations have been established on a PERMANENT [] and for an indefinite period) . . . [o]n the outskirts of *the central building of the Ministry of Energy and Mines* . . . [and in the] *Municipality of San Pedro Ayampuc* [] *in front of the project facilities*" "to protest [and] *demand that the Minister of Energy and Mines, abide by the [amparo] protection* [from] the Supreme Court of Justice, which was granted to the communities for the extension of the mining exploitation license in their territories."[1113] Milton Carrera – a member of Madre Selva who was involved in the attack on Mr. Gálvez[1114] – further remarked that the protests were organized because "Minister [of Energy and Mines] Juan Pelayo Costanoan [] does not want to close [the mine], when the Court's order is clear and orders the closure

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[1110] *See supra* § II.D.2; Maria Rosa Bolaños, "The MEM will not suspend the project," *La Prensa Libre*, 1 Mar. 2016 (C-0006); Natiana Gándara, "CIG urges the MEM to not bend over pressure," *La Prensa Libre*, 11 Mar. 2016 (C-0007).

[1111] *See supra* § II.D.2; Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ministry of Energy and Mines' submission in relation to compliance with amparo provisional dated 10 Mar. 2016, at 5 (C-0008).

[1112] *See supra* § II.D.3; Madre Selva's Notification of Protests dated 18 Jan. 2016 (C-0875); Madre Selva's Notification of Protests dated 8 Feb. 2016 (C-0876); Madre Selva's Notification of Protests dated 18 Feb. 2016 (C-0877); Madre Selva's Notification of Protests dated 26 Feb. 2016 (C-0878); Madre Selva's Notification of Protests dated 8 Mar. 2016 (C-0879);; Madre Selva's Notification of Protests dated 18 Mar. 2016 (C-0881); Madre Selva's Notification of Protests dated 30 Mar. 2016 (C-0882); Madre Selva's Notification of Protests dated 8 Apr. 2016 (C-0883); Madre Selva's Notification of Protests dated 19 Apr. 2016 (C-0884); Madre Selva's Notification of Protests dated 28 Apr. 2016 (C-0885); Madre Selva's Notification of Protests dated 6 May 2016 (C-0886); Madre Selva's Notification of Protests dated 20 May 2016 (C-0887); Madre Selva's Notification of Protests dated 31 May 2016 (C-0888); Madre Selva's Notification of Protests dated 9 June 2016 (C-0889); Madre Selva's Notification of Protests dated 17 June 2016 (C-0890); Madre Selva's Notification of Protests dated 29 June 2016 (C-0927) Madre Selva's Notification of Protests dated 29 July 2016 (C-0891); Madre Selva's Notification of Protests dated 16 Aug. 2016 (C-0892); Madre Selva's Notification of Protests dated 29 Aug. 2016 (C-0928); Madre Selva's Notification of Protests dated 13 Sept. 2016 (C-0929); Madre Selva's Notification of Protests dated 28 Sept. 2016 (C-0893); Madre Selva's Notification of Protests dated 13 Oct. 2016 (C-0894); Madre Selva's Notification of Protests dated 3 Nov. 2016 (C-0895); Madre Selva's Notification of Protests dated 9 December 2016 (C-0930); Madre Selva's Notification of Protests dated 28 Feb. 2018 (C-0931); Madre Selva's Notification of Protests dated 22 Mar. 2018 (C-0896); CALAS' Notification of Protests dated 7 Mar. 2016 (C-0880).

[1113] CALAS' Notification of Protests dated 7 Mar. 2016 (C-0880). (emphasis added).

[1114] Gálvez ¶ 14.

of operations."[1115] The protesters thus demanded that "the Minister of Energy and Mines . . . suspend the operations of the company."[1116]

367. On 21 December 2016, the MEM – in the *middle of these protests* – issued Resolution No. 4056 without basis, directing Exmingua to file the EIA for the Santa Margarita Project within 30 days.[1117] As Exmingua explained to the MEM, due to the continuous protests and blockades at the site, Exmingua and its consultant could not "access the Project area" to complete the local consultations for the EIA because "threats" from the communities protesting against the Project were "jeopardizing" Exmingua's own personnel and that of its environmental consultant.[1118]

368. Consistent with *Grand River v. United States*, Guatemala's actions and inaction in 2016 comprises separate measures sufficient to commence the limitations period.[1119] This is particularly the case when Guatemala *did intervene* in 2014 to quell the earlier protests.[1120] As a result, although Guatemala's actions in respect of the 2016 protests might bear some resemblance to "earlier events," Claimants' challenge to Guatemala's measures in respect of the 2016 protests remains "properly presented."[1121] In addition, unlike in *Corona Materials v. Dominican Republic* and *Berkowitz v. Costa Rica*, Guatemala's actions and omissions – namely, its simultaneous demand that Exmingua file the Santa Margarita EIA and its lack of assistance to quell the protests – clearly had "separate effects on its investment";[1122] Exmingua was left unable to obtain approval for its Santa Margarita EIA.

369. Claimants' FPS claim clearly arises directly out of Respondent's failure, beginning in early 2016 after the Supreme Court's ruling, to take reasonable measures to ensure Claimants' and Exmingua's access to the Project site.[1123] This breach prevented Exmingua and its consultants from being able to conduct the social studies required for completing its Santa Margarita EIA, the approval of which was needed to secure an exploitation license for the Santa Margarita area.[1124]

[1115] Geovani Contreras, "Locals from La Puya continue with the protests," *La Prensa Libre* dated 13 Mar. 2016 (C-0009).

[1116] Nelton Rivera, "The new camp at the peaceful resistance La Puya," *Prensa Comunitaria Km*. 169 dated 19 May 2019 (C-0011).

[1117] *See supra* § II.D.3; Official Notification No. 497 from the MEM to Exmingua, attaching Resolution No. 4056, dated 21 Dec. 2016 (C-0012).

[1118] Letter from Exmingua to the MEM, attaching Notary Public's Certification dated 21 Mar. 2017 (C-0013).

[1119] *See supra* § II.D; Clms' Mem. ¶ 118; Kappes I ¶ 139; Kappes II ¶¶ 72-75.

[1120] *See supra* § II.C; Clms' Mem. ¶ 53; Kappes I ¶ 91.

[1121] *Grand River v. United States*, Decision on Objections to Jurisdiction ¶¶ 81-87 (RL-0039).

[1122] *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award dated 31 May 2016), ¶ 212 (RL-0002).

[1123] Notice of Arbitration ¶ 74.

[1124] *Id.*

370. However, and in the alternative, even *if* the Tribunal were to consider that the relevant breach for which Claimants' claim loss and damage was a continuous breach that began in 2012 (which it is not, for the reasons described above), Claimants' claim still would not be time-barred, because the limitations period was renewed with the continuing breaches that occurred in 2016 and thereafter. In this regard, consistent with *UPS v. Canada* and *Feldman v. Mexico*, Claimants' FPS claim thus remains timely.

3. The Tribunal Has Jurisdiction Over Claimants' National And Most-Favored- Nation Treatment Claims

371. In their Memorial, Claimants explained that Respondent breached its obligation to accord them and their investment national and most-favored-nation treatment by treating Exmingua less favorably than other enterprises that were owned and controlled by third-party nationals or ultimately, beneficially owned by Guatemalan nationals.[1125] Specifically, Claimants showed that Guatemala's Constitutional Court subjected Exmingua to unequal and unfavorable treatment by suspending its operations while allowing Oxec to continue operating until the MEM commenced and concluded consultations; by imposing additional, onerous, subjective and uncertain condition on Exmingua alone, for its license to regain effectiveness; and by delaying ruling on Exmingua's appeal, which raised the same legal issues and was filed before the others, and yet took years longer to decide.[1126] Claimants further demonstrated that the MEM accorded less favorable treatment to Claimants and Exmingua as compared to investors and their investments in like circumstances by completing consultations for Oxec in just a few months, while refusing to even commence consultations for Exmingua.[1127]

372. In a mere three pages of its Counter-Memorial, Respondent raises two separate, multi-tiered jurisdictional objections to Claimants' national treatment ("NT") and most-favored-nation treatment ("MFN") claims. Each is without merit.

a. The Tribunal Has Jurisdiction Over Claimants' National Treatment Claim

373. In its Counter-Memorial, Respondent argues that "all of the actions (or 'treatments') complained of [by Claimants] were taken to enforce the rights of the indigenous communities" [1128]

[1125] Clms' Mem. § III.E.

[1126] *Id.* ¶¶ 325-327; *see also Id.* ¶¶ 103-115.

[1127] *Id.* ¶ 328.

[1128] Resp's C-M ¶ 258.

and, consequently, Claimants' NT claim falls outside of the Tribunal's jurisdiction by virtue of Guatemala's reservation set forth in Annex II of the Treaty. Respondent further asserts that this objection applies to all of Claimants' discrimination claims (that is, even those that Claimants' have made under the MFN provision), because, like Exmingua, Oxec, Minera San Rafael and CGN are all constituted under Guatemalan law.[1129] From this fact, Guatemala erroneously concludes that "all the claims qualify as national treatment"[1130] and, thus, are subject to this NT reservation.

374. *First*, Guatemala's interpretation of its Annex II reservation is fundamentally flawed; that reservation does not preclude jurisdiction over Claimants' NT claim. Respondent's Schedule to Annex II provides that, *inter alia*, with respect to Respondent's NT obligation, "Guatemala reserves the right to adopt or maintain any measure that grants rights or preferences to socially or economically disadvantaged minorities and indigenous peoples."[1131]

375. As elaborated in Claimants' Memorial and below, Claimants' NT claim is predicated on the disparate treatment received by Exmingua from the MEM and the courts, as compared to the treatment accorded to the ultimate, Guatemalan, beneficial owner of Oxec with respect to its investments. Claimants do not challenge any measure that Guatemala adopted or maintained that "grants rights or preferences to . . . indigenous peoples."[1132] Contrary to Guatemala's assertion that "[t]he national treatment claims here fall squarely within this reservation,"[1133] the Annex II reservation is inapposite.

376. Respondent's statement that Claimants' complaints about the disparate treatment they suffered with respect to the timing of the courts' decisions as well as the MEM's inaction is exempt pursuant to Annex II, because "the time was spent giving 'preferences to socially or economically disadvantaged minorities and indigenous peoples,' in accordance with the text of the reservation"[1134] is unexplained and nonsensical. By failing to timely rule on Exmingua's appeal – while ruling on Oxec's appeal, which raised the same legal issues and which was filed later in time – Guatemala did not give "priority" to the "rights to life and integrity of indigenous and tribal peoples."[1135] Similarly,

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[1129] *Id.* ¶ 259.

[1130] *Id.* ¶ ¶ 259.

[1131] DR-CAFTA, Annex II, Schedule of Guatemala (CL-0001); *see also Id.* DR-CAFTA Art. 10.13.2 (providing that the national and most-favored-nation treatment obligations "do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II.")

[1132] Resp's C-M ¶ 256.

[1133] *Id.* ¶ ¶ 258.

[1134] *Id.* ¶ ¶ 258.

[1135] *Id.* ¶ ¶ 258.

by failing to commence – much less complete – consultations in Exmingua's case, as called for by the courts, while immediately commencing and in less than seven months completing consultations in the *Oxec* matter, the MEM did not give "priority" to the "rights to life and integrity of indigenous and tribal peoples."[1136] Respondent's assertion that the courts suspended Exmingua's project so as to ensure that the "operations would not threaten the existence of the indigenous population in the vicinity of the mining project"[1137] is likewise inaccurate. The courts did not grant a right or a preference to indigenous persons by suspending Exmingua's project pending the completion of consultations by the MEM, while permitting Oxec's projects to continue operating while consultations were undertaken by the MEM.

377. *Second*, since their last filing, Claimants have discovered that Oxec's legal owner is a Panamanian company.[1138] Although Oxec has been reported as, and is widely considered to be, beneficially-owned by a well-connected Guatemalan family, the publicly-available corporate records to which Claimants have access, do not reveal this. Oxec, accordingly, may also – or even primarily – be considered to be *foreign*-owned, in which case Claimants' discrimination claim based on disparate treatment accorded to Oxec is more properly considered to fall under the MFN, rather than the NT, obligation. As such, Respondent's Annex II reservation for national treatment claims is inapplicable for this reason as well.

378. *Finally*, Guatemala's attempt to apply this reservation to *all* of Claimants' discrimination claims – including those based on the disparate treatment accorded to Minera San Rafael and CGN – widely misses the mark. Guatemala asserts that, "[w]hile CGN and Mineral San Rafael each have a foreign owner, those foreign entities are irrelevant . . . ,"[1139] because the local enterprises are "Guatemalan (domestic) investors."[1140] Guatemala thus suggests that Claimants could only bring an NT claim with respect to these comparators, and that claim is barred by the aforementioned reservation. This is clearly wrong.

379. If Guatemala were correct – and the foreign ownership of an investment were irrelevant – an investor whose investment was a juridical entity could never bring an MFN claim, since, by definition, its investment needs to be *in Guatemala* and, thus, would have Guatemalan nationality. DR-CAFTA Article 10.4.1 and 10.4.2, however, expressly provide that the MFN obligation requires

[1136] *Id.* ¶ 258; Clms' Mem. ¶ 108.
[1137] Resp's C-M ¶ 258.
[1138] Dun & Bradstreet report dated 13 Apr. 2021 (C-0990).
[1139] Resp's C-M ¶ 259.
[1140] *Id.* ¶ 260.

States to accord to covered *investors and their local investments* MFN treatment *with respect to the establishment and operation of their local investments*.[1141] Because Claimants assert that they have been accorded less favorable treatment with respect to their Guatemalan investment than the *third-State* owners of similarly-situated Guatemalan investments, that claim is an MFN, and not an NT, claim. Likewise, Claimants' claim that Exmingua has been treated less favorably than other investments in like circumstances that are owned by *third-State* nationals is an MFN, and not an NT, claim.

b. The Tribunal Has Jurisdiction Over Claimants' MFN Claim

380. Guatemala's jurisdictional objection to Claimants' MFN claim is similarly infirm. Guatemala first mistakenly contends that it is "entirely unclear whether Claimants have set out any MFN claims," because, it erroneously asserts that "Claimants never mention the foreign owners of Minera San Rafael and CGN – Pan American Silver (Canada) and the Soloway Group (Switzerland), respectively. Nor do Claimants discuss any similarities between those two entities and themselves, as they must do to satisfy the MFN standard."[1142] Guatemala next argues that, even if Claimants have pled an MFN claim, that claim is precluded by a different reservation in Annex II, which Guatemala incorrectly grants it the option of adopting "any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement."[1143] Guatemala elaborates by stating that, "put another way, Guatemala has reserved the right to accord different treatment between investors from the United States and those from any country that has a pre-existing treaty with Guatemala."[1144] Guatemala then draws the mistaken conclusion that the portion of Claimants' MFN claim that is premised on less favorable treatment as compared to that granted to the Swiss owners of the Fenix mine (CGN) is barred by this reservation, because the Swiss-Guatemala BIT pre-dates the DR-CAFTA.[1145]

381. *First*, contrary to Respondent's assertion, Claimants have clearly set forth MFN claims. In particular, in the MFN section of their Memorial, Claimants explained that the mines operated by Minera San Rafael and CGN were foreign-owned.[1146] They also explained that Exmingua was in like

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[1141] DR-CAFTA, Art. 10.4.1, 10.4.2 (CL-0001).

[1142] Resp's C-M ¶ 262.

[1143] *Id.* ¶ 261.

[1144] *Id.* ¶ 261.

[1145] *See Id.* ¶ ¶ 263.

[1146] Clms' Mem. ¶ 323 (MFN section cross-referencing to other sections of the Memorial where the foreign ownership of San Rafael and CGN is explained); *see also Id.* ¶¶ 111, 115.

circumstances with those operating companies for purposes of the measures at issue and Claimants were in like circumstances with the foreign owners of those mines for purposes of the measures.[1147] Claimants further demonstrated how "[d]espite being in like circumstances, Claimants and Exmingua received less favorable treatment, by the Guatemalan courts and the MEM, than Oxec, San Rafael, and CGN, and their respective investors, in regard to the operation of Claimants' investment."[1148] Guatemala's purported confusion as to whether Claimants have made an MFN claim and the basis for that claim is therefore unwarranted.

382. *Second*, and as explained above, Guatemala's suggestion that Claimants have not made an MFN claim because Exmingua, as well as [Minera San Rafael] and [CGN] are Guatemalan nationals is wrong. Claimants' claims that Guatemala has treated Exmingua less favorably than local investments in like circumstances that are owned by third-State nationals, and that Guatemala has treated Claimants less favorably than third-State nationals in like circumstances with respect to the operation of Exmingua, are MFN (and not NT) claims.

383. *Finally*, as it does with respect to the Annex II reservation in connection with Claimants' NT claim, Guatemala grossly misconstrues this other Annex II reservation in arguing that it forecloses Claimants' MFN claim. The reservation at issue provides that "Guatemala reserves, vis-à-vis the United States … the right to adopt or maintain any measure that accords differential treatment to countries *under any bilateral or multilateral international agreement* in force or signed prior to the date of entry into force of this Agreement."[1149] This reservation thus preserves Respondent's ability to grant specific treatment under a pre-existing treaty without offering that same treatment to investors and their investments covered by the DR-CAFTA. The ordinary meaning of the terms of the Treaty makes this clear, as the treatment that does not need to be extended to US investors or their investments is treatment that is granted *under* or, in other words, *pursuant to*, another investment treaty. Contrary to Guatemala's argument, the reservation does not grant it free rein to discriminate in all matters against US investors and investments vis-à-vis investors and investments covered by any treaty that pre-dates the DR-CAFTA.

384. The United States' submission is in accord with Claimants' interpretation:

> This reservation relates only to differential treatment accorded to an investor of a third State pursuant to a provision of an existing international agreement. That is, a

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[1147] Clms' Mem. ¶ 323.

[1148] *Id.*; *see also Id.* ¶¶ 325-328 (elaborating on the same).

[1149] DR-CAFTA, Annex II, Schedule of Guatemala (CL-0001) (emphasis added).

> CAFTA-DR Party that has taken this reservation is not obligated to extend that same treatment accorded *pursuant to that treaty* to nationals of other CAFTA-DR Parties. However, this reservation *does not apply with respect to differential treatment accorded to third State nationals other than 'under' – that is, pursuant to – the provisions of such an existing treaty*.[1150]

385. Likewise, in their commentary on NAFTA Chapter 11, Meg Kinnear, Andrea Bjorklund and John Hannaford explain the meaning of an analogous provision in the NAFTA:

> In Article 1108(6), all three State Parties have taken identical reservations under Article 1103 *with respect to their obligations under other bilateral and multilateral investment treaties* existing at the time the NAFTA entered into force. Thus, if any Party had accorded greater rights to investors from other nations, NAFTA investors *could not invoke the MFN clause to reap the benefits of those concessions*.[1151]

386. Guatemala's contention that it may discriminate against United States' investors and their investments in favor of any foreign investor and their investments so long as Guatemala has entered into an investment treaty with that foreign investor's home State that pre-dates the signing of the DR-CAFTA is thus unsupported by the plain meaning of the text as well as its purpose.

B. Guatemala Unlawfully Expropriated Claimants' Investments

387. As set out in Claimants' Memorial, Guatemala unlawfully expropriated Claimants' investments by depriving them of the opportunity to develop and operate the Tambor Project, and rendering their shareholding in Exmingua worthless by unlawfully, arbitrarily and indefinitely suspending Exmingua's Progreso VII exploitation license, by seizing Exmingua's gold concentrate, and by *de facto* suspending Exmingua's Santa Margarita exploration license and preventing Exmingua from obtaining an exploitation license for Santa Margarita for an indefinite period of time.[1152] Claimants demonstrated how Guatemala's measures were expropriatory by reference to the criteria set out under the Treaty[1153] and that such expropriation was unlawful.[1154]

388. In response, Guatemala makes a number of flawed arguments, (i) seeking to interpret the Treaty provisions by reference to domestic U.S. law,[1155] (ii) characterizing Claimants' loss of

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[1150] US NDP Submission ¶ 37 (emphasis added).

[1151] MEG KINNEAR, ANDREA KAY BJORKLUND AND JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1108-16 (2006) (CL-0338) (emphasis added).

[1152] Clms' Mem. § III.A.

[1153] *Id.* § III.A.2.

[1154] *Id.* § III.A.3.

[1155] Resp's C-M ¶¶ 462-464, 470.

opportunity to operate and develop the Tambor Project as a right or interest incapable of being expropriated,[1156] (iii) denying that it can be held responsible for expropriatory action taken by its courts,[1157] and (iv) denying its expropriatory conduct,[1158] and invoking the police powers doctrine.[1159] Respondent also attempts a reprise of its arguments regarding reflective loss, by claiming that Claimants have failed to establish any interference with their investments in Exmingua.[1160]

389. As demonstrated below, Guatemala fails on all counts to absolve itself of liability for unlawfully expropriating Claimants' investments in violation of the Treaty.

1. Respondent's Arguments On Treaty Interpretation Are Flawed

390. As Claimants indicated in their Memorial, Article 10.7 of the Treaty – which is to be interpreted in accordance with Annexes 10-B and 10-C – contains the State's obligation to refrain from unlawfully expropriating the investments of covered investors.[1161] These Treaty provisions must be interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("VCLT").[1162]

391. Although Respondent does not dispute these fundamental tenets in its Counter-Memorial, it argues that the expropriation obligation in the Treaty must be construed in light of "U.S. legal principles and practices in expropriation," on the basis that "Article 32 of the Vienna Convention instructs treaty interpreters to consider the circumstances of the treaty's conclusion" and that "[t]he historical background against which the treaty was negotiated should be examined."[1163] Respondent, in particular, asserts that "Annex 10-C was negotiated by the U.S. Government to be consistent with its legal principles and practices, specifically those embodied in the U.S. Supreme Court's decisions in *Penn State* and *Tahoe*, and is a textual replica of the U.S. Model BIT Treaty" and that, therefore, the Tribunal "is obligated to recognize and breath[e] life into th[is] intention."[1164] This is misguided.

[1156] *Id.* ¶ 466 .
[1157] Resp's C-M ¶¶ 467-468, 493-529.
[1158] *Id.* ¶¶ 530-586.
[1159] *Id.* ¶¶ 471, 568-586.
[1160] *Id.* ¶¶ 473-492.
[1161] Clms' Mem. ¶¶ 145-146.
[1162] Vienna Convention on the Law of Treaties, Arts. 31 and 32 (CL-0005).
[1163] Resp's C-M ¶ 463.
[1164] *Id.* ¶ 532; *see also, e.g., id.* ¶¶ 463- 464, 468, 470, 532, 538, 540, 568, 575.

392. *First*, Respondent confusingly refers to "objective factors" under Article 31 in the same breath as "supplementary means" under Article 32,[1165] and does not even attempt to establish why recourse to the supplementary rules of interpretation under VCLT Article 32 is necessary for interpreting the provisions of the Treaty. Article 32 is a subsidiary rule that "does not provide for alternative, autonomous, means of interpretation but only for means to aid an interpretation governed by the principles contained in Article 31" and is an "exception" that "must be strictly limited."[1166] As the provision specifies:

> Recourse *may* be had to *supplementary* means of interpretation, including the preparatory work of the treaty *and the circumstances of its conclusion*, in order to *confirm the meaning resulting from the application of article 31*, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning *ambiguous or obscure*; or
>
> (b) leads to a result which is *manifestly absurd or unreasonable*.[1167]

Respondent make *no* reference to any circumstances that would merit recourse to supplementary means to interpret the expropriation provisions in the Treaty.

393. *Second*, Respondent argues with reference to case law from the World Trade Organization ("WTO") that while "the practice of one State party is not conclusive as to the meaning of the text of the treaty, it is not irrelevant."[1168] This, too, is wrong. The WTO case law relied on by Respondent concerns the interpretation of schedules of commitment,[1169] which are "originally unilateral acts that

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[1165] *Id.* ¶ 463.

[1166] J. ROMESH WEERAMANTRY, TREATY INTERPRETATION IN INVESTMENT ARBITRATION (2012), at ¶ 4.02 (CL-0339) quoting from the ILC Draft Articles on the Law of Treaties, reprinted in *ILC Report on the work of its Eighteenth Session*, 4 May – 19 July 1996, UN Doc. A/6309/Rev.1, at 223, ¶ 19; *see also Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction dated 11 May 2005 ¶ 142 (CL-0072) ("This [Article 31] being the principal means of interpretation, it is the one that must be applied by the Tribunal. It has already been noted that the terms of the Treaty opted for the alternatives discussed, making it unnecessary to resort to supplementary means."); *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim) dated 2 Aug. 2004 ¶ 32 (CL-0040) ("In view of the explicit text of the Treaty and its object and purpose, it is not even necessary to resort to supplementary means of interpretation, such as the preparatory work, a step that would be required only in case of insufficient elements of interpretation in connection with the rule laid down in Article 31 of the Convention."); *Methanex Corp. v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits dated 3 Aug. 2005 ¶ 22 (CL-0379) ("[P]ursuant to Article 32, recourse may be had to supplementary means of interpretation only in the limited circumstances there specified. Other than that, the approach of the Vienna Convention is that the text of the treaty is deemed to be the authentic expression of the intentions of the parties; and its elucidation, rather than wide-ranging searches for the supposed intentions of the parties, is the proper object of interpretation.").

[1167] VCLT, Arts. 31 and 32 (CL-0005) (emphasis added).

[1168] Resp's C-M ¶ 463.

[1169] *See* Resp's C-M ¶ 463 (citing EC — Computer Equipment, WT/DS62/AB/RWT/DS67/AB/R WT/DS68/AB/R (5 June 1998), ¶ 93). For an explanation of "Schedules of Commitment", *see* WTO, Schedules of specific commitments and lists of Article II exemptions (CL-0381).

eventually form part of the [WTO] treaty framework."[1170] The relevance of one State party's practice to interpret what was originally a *unilateral* act does not render unilateral practice relevant to interpreting a multilateral treaty such as the DR-CAFTA.

394. The references in the DR-CAFTA to the "general and consistent practice of *States*," to "customary international law," and to the Parties' "shared understanding" "with respect to expropriation"[1171] further militates *against* relying on any *one* State Party's practice to inform the meaning of the terms of the DR-CAFTA, especially Article 10.7 and Annex 10-C. Correspondingly, arbitral tribunals (including the present Tribunal) properly have viewed unilateral evidence reflecting only one negotiating State Party's perspective with skepticism in interpreting international treaties.[1172]

395. Clearly then, there is no basis for Respondent's argument that the Tribunal must consider "U.S. legal principles and practice in interpreting the provisions of" the Treaty.[1173] In fact, the factors listed in Annex 10-C(4) for a tribunal to consider when determining whether there has been an indirect expropriation are the "same factors" that arbitral tribunals have used to define expropriations under customary international law[1174] and "virtually all" investment arbitration awards can be

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[1170] ALEXANDER ORAKHELASHVILI, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW 477 (OUP 2008), at 477 (CL-0340).

[1171] DR-CAFTA, Annexes 10-B and 10-C (CL-0001) (emphasis added).

[1172] *See, e.g.*, Decision on Prelim. Obj., ¶ 155 (noting that "[a] single State's interpretation of a treaty, circulated for internal implementation purposes rather than as a negotiating document shared with other State Parties, does not qualify as 'preparatory work' of the treaty within the meaning of VCLT Article 32…"); *The Renco Group, Inc. v. Republic of Peru*, Case No. UNCT/13/1, Decision as to the Scope of the Respondent's Preliminary Objections under Article 10.20.4 dated 18 Dec. 2014 ¶¶ 225 – 231 (CL-0380) (remarking that "[t]ribunals in investor-state arbitrations have tended to approach the testimony of state officials and negotiators with caution"); *Sempra Energy Int'l v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award dated 28 Sep. 2007 ¶ 385 (CL-0258) ("The view of one State does not make international law, even less so when such a view is ascertained only by indirect means of interpretation or in a rather remote or general way as far as the very Treaty at issue is concerned."); *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award dated 8 July 2016 ¶ 476 (CL-0375) ("It would be quite novel and potentially raise due process concerns in investment arbitration cases if a subsequent unilateral statement by one State could be given substantial, let alone decisive, weight."); *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award dated 22 May 2007 ¶ 337 (CL-0259) ("Not even if this was the interpretation given to the clause today by the United States would this necessarily mean that such interpretation governs the Treaty. What is relevant is the intention the parties had in signing the Treaty and this does not confirm the selfjudging interpretation. Even if this interpretation were shared today by both parties to the Treaty, it would still not result in a change of its terms. States are of course free to amend the Treaty by consenting to another text, but this would not affect rights acquired under the Treaty by investors or other beneficiaries."); *see also Apotex v. United States*, ICSID Case No. ARB(AF)/12/1, Award dated 25 Aug. 2014 ¶ A.44 (RL-0215) ("[T]his Tribunal owes no special deference to the views of the Respondent as a NAFTA Party. . . . Canons of interpretation operating only in US domestic law are not relevant to this Tribunal.").

[1173] Resp's C-M ¶ 464.

[1174] *See* Simon Baughen, *Expropriation and Environmental Regulation: The Lessons of NAFTA Chapter Eleven*, 18 J. ENV. LAW 207, 227 (2006) ("In considering the scope of article 1110, NAFTA Tribunals have taken into account three factors .... These factors are specifically referred to in the 'shared understanding' to the expropriation chapter of the new US Model BIT [and they] are *the same factors that Tribunals under BITs have used to define expropriations under customary international law*….") (emphasis added) (CL-0341) (emphasis added).

explained by reference to the same framework.[1175] There is thus, no reason to interpret the Treaty by reference to U.S. law, nor is there reason to believe that there is a "heavier burden on the Claimants to establish indirect expropriation" under the Treaty relative to making a showing under other treaties where the factors listed in Annex 10-C(4) are not specifically articulated.[1176]

2. Claimants' Loss of Opportunity Is A Core Element Of Claimant's Protected Property Rights And Interests

396. In their Memorial, Claimants demonstrated that Guatemala had unlawfully expropriated their investments in Exmingua by depriving them of their opportunity to develop as well as operate their mining Projects at Tambor.[1177] In its Counter-Memorial, Respondent attacks Claimants for seeking to pursue an "alternative theory" of direct injury of "a lost opportunity to develop the Tambor project," which it contends is a "belated and inappropriate amendment of [Claimants'] claim."[1178] Respondent observes, with reference to Annex 10-C.2 of the Treaty, that only property rights or interests are capable of being expropriated.[1179]

397. Relying on *Bayview v. Mexico*, Respondent contends that "there are no property rights where…exploitation or use of the natural resources requires the grant of a concession under domestic law, and such concession does not guarantee the existence or permanence of the natural resources."[1180] Respondent then argues that Guatemala's Mining Law provides no such guarantee and quotes caveats from Radius Gold's Annual Report for 2011 cautioning US investors against assuming that "part or all of an inferred resource exists, or is economically or legally mineable."[1181] Finally, Guatemala asserts that a loss of opportunity only implicate the "valuation of damages, not the determination of whether there was a breach of the treaty."[1182] Respondent's objections are meritless.

[1175] *See* KENNETH VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), Chapter 7 on 'The Expropriation provision', at 514 (CL-0342) ("As noted above, Annex B to the 2004 model provides that no expropriation of any type occurs unless the host state has interfered with the investor's property right or interest. Further, where such an interference occurs indirectly, such as through a regulation, Annex B identifies three factors that must be considered in determining whether the interference constitutes an indirect expropriation. *Virtually all of the awards can be explained by reference to this analytic framework*.") (emphasis added).

[1176] Resp's C-M ¶ 470.

[1177] Clms' Mem. ¶¶ 144, 165-166.

[1178] Resp's C-M ¶ 483.

[1179] *Id.* ¶ 483.

[1180] *Id.* ¶ 485.

[1181] *Id.* ¶ 485.

[1182] *Id.* ¶ 491.

398. *First*, Guatemala is incorrect to assert that Claimants' arguments regarding lost opportunity are an "alternative theory" or a "belated or inappropriate amendment of their claim."[1183] As set forth in Claimants' *Notice of Arbitration*, Claimants claimed that "Guatemala has expropriated Claimants' investment in Exmingua, because the State's suspension of the exploitation license for the Progreso VII Project and its illegal *moratorium* have deprived Exmingua of the use and enjoyment of its mining rights to the Progreso VII and Santa Margarita Projects" and, with regards to the Santa Margarita license area in particular, Claimants asserted that they "have been unable to enjoy the benefits of their exploration license and to obtain an exploitation license due to the illegal *moratorium* and the failure of the State to protect their investment."[1184] Claimants then claimed damages in the amount to compensate them for the loss of opportunity to develop and operate the Tambor Project.[1185] There has been no change to the claim.

399. *Second*, Claimants' lost opportunity to further develop the Tambor Project is a property right that is appurtenant to their shareholding in Exmingua, which holds validly-granted licenses under Guatemalan law for the exploitation and exploration of Progreso VII and Santa Margarita, respectively.[1186] As NAFTA tribunals have recognized, "the restrictive notion of property as a material 'thing' is *obsolete* and has ceded its place to a contemporary conception which includes managerial control over components of a process that is wealth producing."[1187] As such, Guatemala's unduly restrictive notion of property rights and interests that may be expropriated under the Treaty must be rejected.[1188]

400. *Third*, Guatemala's reliance on *Bayview v. Mexico* for what it claims is the general proposition that, absent a concession, there is no property right,[1189] is misplaced. In that case, the tribunal dismissed the claim for lack of an investment, because the claimants had not made any

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[1183] *Id.* ¶ 483.

[1184] *Daniel W. Kappes and Kappes, Cassiday & Associates v. The Republic of Guatemala* ICSID. Case No. Arb/18/43, Notice of Arbitration dated 9 Nov. 2018 ("Notice of Arbitration") ¶ 77.

[1185] *Id.* ¶ 78.

[1186] Clms' Mem. ¶¶ 38, 169.

[1187] *Methanex v. United States*, NAFTA, UNCITRAL, Final Award on Jurisdiction and Merits dated 3 Aug. 2005, ¶ 17 (CL-0379) (emphasis added).

[1188] *See Pope & Talbot v. Canada*, NAFTA, UNCITRAL, Interim Award dated 26 Jun. 2000 ¶¶ 96 - 98 (CL-0129) (holding that "access to the U.S. market" is a protected property interest under NAFTA Article 1110 (Expropriation)); *see also* Jan Paulsson and Zachary Douglas, *Indirect Expropriation in Investment Treaty Arbitrations*, in NORBERT HORN AND STEFAN MICHAEL KROLL (EDS), ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS, STUDIES IN TRANSNATIONAL ECONOMIC LAW, VOLUME 19, 152-153 (Kluwer Law International; Kluwer Law International 2004) (RL-0278) ("Investment treaty tribunals have generally favoured a more expansive concept of property rights.").

[1189] Resp's C-M ¶ 485 (referring to the *Bayview v. Mexico* tribunal's statement that "[t]he Mexican Law of National Waters confirms the need for the grant of a concession for the exploitation or use of waters, and specifies that a concession does not guarantee the existence or permanence of the water that is the subject of the concession.").

investment in the respondent State; rather, the US claimants argued unsuccessfully that the water flowing through the Rio Grande *in Mexico* constituted their investment, because once that water reached the United States, they were entitled to a certain volume of that water under the law of Texas.[1190] This says nothing about Claimants' property rights in Exmingua, which are most certainly capable of being expropriated. Furthermore, Respondent ignores that Exmingua *already* holds an exploration license for Santa Margarita,[1191] which is a property right or interest, and, as confirmed by Professor Fuentes, gave Exmingua legitimate confidence that it would be granted an exploitation license "in accordance with the lawful administrative process in effect at the time."[1192] Nor is this undermined by the disclosure in Radius' 2012 financial statements that there is no guarantee that the mineral deposits will be converted into reserves, as suggested by Guatemala.[1193] That disclosure was made pursuant to SEC rules in force at the time.[1194] As detailed below, the uncertainty in this regard that exists as of the date of the Award is taken into account by SRK and Versant, respectively, in estimating the mineral resources at Tambor and in calculating Claimants' damages.

401. *Finally*, Respondent's argument that a loss of opportunity would "implicate only the valuation of damages, not the determination of whether there was a breach of the treaty"[1195] is circular and incorrect. In *Eureko v. Poland,* for instance, the tribunal found that the lost opportunity to acquire additional shares in an investment pursuant to an agreement amounted to an expropriation,[1196] whereas the *Bilcon v. Canada*, tribunal found an FET breach where the claimants "were not afforded a fair *opportunity*" to have the environmental impact of their quarry and maritime terminal project assessed in a fair and non-arbitrary mannerafter their investment was denied a license on a novel legal ground.[1197]

[1190] *Bayview Irrigation District* et al. *v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award dated 19 June 2007 ¶¶ 116-118 (RL-0233).

[1191] Clms' Mem. ¶ 169.

[1192] Fuentes II ¶ 98-99; Fuentes I ¶ 81; Clms' Mem. ¶¶ 177-179.

[1193] Resp's C-M ¶ 485.

[1194] Before 31 October 2018, the SEC rules required that mining companies listed with the SEC could only "disclose mineral resources (as opposed to mineral reserves, which are more certain to be exploited) if required by foreign or state law, a carveout that the SEC [had] construed narrowly. The rigidness of this approach attracted criticism and produced odd results, particularly for registrants voluntarily disclosing mineral resources in other jurisdictions." *See* Rebecca Campbell, Jill Concannon, Andrew Weisberg and Doron Loewinget, "SEC Harmonizes its Mining Disclosure Requirements with Global Industry Practice*," White & Case,* 29 Nov. 2018 at https://www.whitecase.com/publications/alert/sec-harmonizes-its-mining-disclosure-requirements-global-industry-practice.

[1195] Resp's C-M ¶ 491.

[1196] *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award dated 19 Aug. 2005 ¶¶ 239-240 (CL-0125).

[1197] *William Ralph Clayton,* et al. *v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability dated 17 Mar. 2015 ¶¶ 603-604, 740 (CL-0088) (emphasis in original) ; *see also William Ralph Clayton* et al. *v. Government of Canada*, UNCITRAL, Award on Damages dated 17 Mar. 2015¶¶ 126, 132-133 (CL-0243).

3. Respondent's Judicial Measures Can Be Challenged As Expropriatory

402. As Claimants set out in their Memorial, actions or omissions by a State's judiciary, like the acts of any other State organ, may give rise to an expropriation.[1198] In this regard, Claimants explained how, in addition to the actions and omissions of its executive and administrative organs, the actions and omissions of Guatemala's Courts also effectuated an expropriation of Claimants' investments, in particular, by suspending indefinitely Exmingua's exploitation license.[1199] Claimants also relied on jurisprudence showing that judicial conduct may be expropriatory.[1200]

403. In its Counter-Memorial, Respondent argues that the acts and omissions of its judiciary cannot be attributed to it, absent a finding of denial of justice.[1201] In this context, Guatemala relies upon Judge Tanaka's separate opinion in *Barcelona Traction*[1202] and tries to distinguish the cases relied upon by Claimants[1203] to argue that the "weight of jurisprudence" lies in favor of its position.[1204] Along similar lines, the United States' NDP submission takes the position that decisions of domestic courts cannot be considered expropriatory.[1205] As discussed in the Memorial[1206] and elaborated below, these arguments are incorrect.

404. *First*, there is nothing in the relevant provisions of the Treaty governing expropriation that justifies drawing any distinction between executive, legislative, and judicial measures insofar as an evaluation of whether or not they amount to expropriatory acts is concerned. Indeed, there is no basis to impose a higher burden to establish expropriatory conduct when implemented through a State's judicial arm, as Respondent contends.[1207] Nor do Claimants need to show any collusion between the MEM, MARN, CALAS or the Supreme Court and Constitutional Court to prevail on their claim for indirect expropriation, as Respondent erroneously suggests.[1208] As Mr. Gharavi explains:

[1198] Clms' Mem. ¶¶ 148, 157-158.

[1199] *Id.* ¶¶ 165-166.

[1200] *Id.* ¶¶ 157-158 (citing cases).

[1201] Resp's C-M ¶¶ 494-507.

[1202] *Id.* ¶¶ 493-495.

[1203] *Id.* ¶¶ 496, 499, 502, 503-507.

[1204] Resp's C-M ¶ 507.

[1205] US NDP Submission ¶ 48.

[1206] *See* Clms' Mem. ¶¶ 148, 157-158.

[1207] Resp's C-M ¶¶ 493-511.

[1208] *Id.* ¶¶ 509-510. Indeed, Respondent omits to mention that in *Rumeli*, the tribunal rejected allegations of collusion between the the President of Kazakhstan's family, the beneficiary of the expropriation (Telcom Invest) and the judges at various levels of the Kazakh judiciary. *See Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award dated 29 July 2008 ¶ 715 (CL-0147).

> Legal instruments do not distinguish judicial expropriation from other forms of expropriation, *or subject it to different or stricter norms* than legislative or executive expropriation. Similarly, no such distinction is made for purposes of attribution between the judiciary, executive or the legislative branches of power, nor with regards to the position of the State organ in the hierarchy under Article 4.1 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.[1209]

405. Moreover, an indirect expropriation may take one or several steps[1210] and, therefore, may be deemed a "creeping" expropriation, which occurs through a series of acts and/or omissions in the aggregate.[1211] The acts and omissions of any State organ, including the judiciary, may constitute part of a creeping expropriation. Where that is the case:

> [T]ribunals did not find it necessary to decide separately on the propriety of judicial conduct, treated the question of propriety as immaterial, or even upheld an expropriation claim despite the lack of any wrongdoing on the part of the courts. Likewise, in circumstances where the impugned judicial conduct formed part of a composite wrongful act comprised of a series of acts or omissions attributable to different State organs, tribunals refrained from separately reviewing the propriety of such conduct, or even upheld expropriation claims in the absence of any judicial misconduct.[1212]

As just one example, in *Rumeli v. Kazakhstan* (which Respondent seeks to distinguish on the basis that Claimants purportedly do not allege any "improper collusion" between different State organs)[1213] the tribunal found a creeping expropriation involving the State's executive and judicial organs.[1214]

[1209] Hamid G. Gharavi, *Discord Over Judicial Expropriation*, 33 (2) ICSID REVIEW 349-357 (2018) (353) (CL-0345) (emphasis added); *see also* Vid Prislan, *Judicial Expropriation in International Investment Law*, ICLQ 70 Jan. 2021 165–195 (166) (CL-0346) ("from the perspective of contemporary international law, there is nothing to suggest that taking of property could not be the result of judicial action"); CSABA KOVÁCS, ATTRIBUTION IN INTERNATIONAL INVESTMENT LAW 56 (Kluwer Law International 2018), at 102 (CL-0347) ("Equally uncontroversial is the attribution of the conduct of the court to the State in cases involving a judicial expropriation.").

[1210] Clms' Mem. ¶ 148 (citing cases).

[1211] *See*, *e.g.*, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 Sept. 2003 ¶ 20.22 (RL-0100) ("Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property."); Rep. of the Int'l Law Comm'n on the Responsibility of States for Internationally Wrongful Acts, 53rd Sess., UN Doc./56/10, *reprinted in* (2001) 2(2) Y.B. INT'L L. COMM'N 20, UN Doc. A/CN.4/SER.A/2001/Add.1 (hereinafter "ILC Articles"), Art. 15(1) (CL-0348) ("The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.").

[1212] Vid Prislan, *Judicial Expropriation in International Investment Law*, 70 ICLQ 165, 176 (internal citations omitted) (2020) (CL-0346).

[1213] Resp's C-M ¶¶ 509-510.

[1214] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award dated 29 July 2008 ¶ 434 (CL-0147).

406. Here, the series of events that constitute the indirect expropriation of Claimants' investments in Exmingua are a consequence of acts and omissions of the executive (including the President of Guatemala, the MEM, the MARN, and the National Police) as well as various courts in Guatemala.[1215] There thus is no need for the Tribunal to review the propriety of the judicial conduct in isolation from the entire chain of events.

407. *Second*, Respondent's reliance on ICJ jurisprudence and its attempts to distinguish the cases relied upon by Claimants fail. Respondent, for instance, relies on Judge Tanaka's observations in *Barcelona Traction*,[1216] despite the fact that these observations were made in his separate opinion: The ICJ did *not* rule on any issue of judicial misconduct, finding a lack of *jus standi* on the part of Belgium and holding the case to be inadmissible.[1217] Indeed, as the cases relied upon by Claimants in their Memorial demonstrate, Respondent's remark that "a State cannot be held liable for the acts of its judiciary absent a finding of denial of justice"[1218] is incorrect.[1219] In fact, although Respondent cites to cases in support, the contrary view adopted by Claimants has "attracted the most subscriptions by arbitral tribunals."[1220]

408. Respondent's reliance on *Azinian v. Mexico* to argue that denial of justice is the only basis for engaging a State's liability for the actions of its judiciary,[1221] moreover, is misplaced. As the extract quoted by Respondent reveals, the *Azinian* tribunal held that "the Claimants must show either a denial of justice, *or a pretence of form to achieve an internationally unlawful end.*"[1222] Scholars thus have argued against precisely the kind of "spin" that Respondent places on *Azinian*, as the case did "not address the issue [of judicial expropriation] directly and its holdings on associated matters are unclear and … very fact specific."[1223] In *Swisslion v. Macedonia*, which Respondent also tries to distinguish,

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[1215] Clms' Mem., ¶¶ 165-166.

[1216] Resp's C-M ¶ 494.

[1217] *Case Concerning the Barcelona Traction, Light and Power Company, Limited*, Judgment dated 5 Feb. 1970, ¶¶ 101-102 (CL-0368).

[1218] Resp's C-M ¶ 495.

[1219] Clms' Mem. ¶¶ 157-158 (citing cases); *see also* Hamid G. Gharavi, *Discord Over Judicial Expropriation*, 33 (2) ICSID REVIEW 349, 353 (2018) (CL-0345) ("Legal instruments do not distinguish judicial expropriation from other forms of expropriation, or subject it to different or stricter norms than legislative or executive expropriation").

[1220] Martin Jarrett, *Extricating the Illegality Requirement from Judicial Expropriation*, MPIL RESEARCH PAPER SERIES NO. 2020-50, at 4 (citing cases) (CL-0349).

[1221] Resp's CM ¶¶ 495-496.

[1222] *Azinian and others v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award dated 1 Nov. 1999 ¶ 99 (CL-0144) (emphasis added).

[1223] Hamid G. Gharavi, *Discord Over Judicial Expropriation*, 33 (2) ICSID REVIEW 349, 352 (2018) (CL-0345) ("This is an unpersuasive reading of Azinian. Nowhere in the Award could the Tribunal be found to have made such a categoric statement that denial of justice is the only ground to challenge a national court's decision under international law. To the contrary, the Tribunal in that case cited the President of the International Court of Justice confirming that the responsibility

while the tribunal held that a lawful termination of a contract between a State entity and an investor cannot be considered an expropriation,[1224] it agreed in principle that a State is responsible for a judicial expropriation.[1225] Indeed, other tribunals have found a judicial expropriation where court decisions have unlawfully invalidated contractual rights.[1226]

409. Likewise, the conclusion of the tribunal in *Standard Chartered Bank v. Tanzania* on the facts does not in any way detract from the tribunal's acknowledgment that "judicial decisions that permit the actions or inactions of other branches of the State and which deprive the investor of its, property or property rights, can still amount to expropriation. While denial of justice could in some case result in expropriation, it does not follow that judicial expropriation could only occur if there is denial of justice."[1227] Respondent's attempts to distinguish *Saipem v. Bangladesh* also fail,[1228] as it ignores that tribunal's determination that an expropriation resulting from the actions of the State's judiciary does not necessarily amount to a denial of justice and, therefore, exhaustion of local remedies is not required for a judicial expropriation.[1229] The NAFTA tribunal's decision in *Eli Lilly v. Canada* is again consistent with Claimants' position that "the unlawfulness threshold for a judicial expropriation is not necessarily a denial of justice but may also consist of any other violation of international law."[1230]

410. Further, in *Karkey v. Pakistan*, the tribunal rejected Pakistan's argument that the tribunal could only consider the decision of the Pakistan Supreme Court in the context of a denial of justice claim:

> [The Tribunal] must analyse whether the Judgment presents deficiencies which are unacceptable from the viewpoint of international law . . . . Deficiencies relating to the substance of the Judgment, in certain circumstances, may amount to a breach of

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of the State for acts of its judicial authorities may result from a decision of a municipal court clearly incompatible with a rule of international law").

[1224] *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award dated 6 July 2012 ¶ 314 (CL-0275).

[1225] *Id.* ¶ 310.

[1226] *See Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award dated 22 Aug. 2017 ¶¶ 550, 645, 648 (CL-0217).

[1227] *Standard Chartered Bank (Hong Kong) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/15/41,* Award dated 11 Oct. 2019 ¶ 279 (CL-0278).

[1228] Resp's C-M ¶¶ 504-505.

[1229] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award dated 30 June 2009 ¶ 181 (CL-0145).

[1230] Sara Mansour Fallah, *Judicial Expropriations – Difficulties in Drawing the Line Between Adjudication and Expropriation*, TRANSNATIONAL DISPUTE MANAGEMENT 1, 12 (2019) (CL-0350).

> international law. In particular, an international tribunal may decide not to defer to an arbitrary judicial decision which is, as such, incompatible with international law.[1231]

The tribunal then held that the Pakistan Supreme Court judgment "which declared the Contract to be void ab initio was arbitrary . . . has no effect in international law, and the Tribunal is not bound by its finding that the Contract was void. For the Tribunal, it is nothing more than a fact, attributable to Pakistan as admitted by the Respondent, which started a process leading to the deprivation of Karkey's contractual rights, the arrest of its Vessels and the seizure of its bank accounts."[1232] The tribunal then found that Pakistan had expropriated Karkey's investment through the judgment declaring Karkey's contract to be void *ab initio*.[1233] Similarly, here, the Tribunal is entitled to evaluate whether the deficiencies in the substance of the impugned decisions and judgments from the Guatemalan courts, along with the egregious acts and omissions of the MEM, the MARN, the President, and the National Police, together amount to an expropriation.

411. *Finally*, even if Guatemala's argument were correct and its expropriatory acts could only be attributable to it on a showing of denial of justice, Claimants have met that threshold.[1234] Contrary to Guatemala's assertions,[1235] the decisions of its courts (including the suspension of Exmingua's exploitation license) were arbitrary and unlawful,[1236] and equally qualify as expropriatory acts.

4. Guatemala's Measures Have Effectively Expropriated Rights Relating To Santa Margarita

412. In their Memorial, Claimants demonstrated that, as part of the expropriation of their interest in Exmingua, Respondent deprived Exmingua of all value by, among other things, *de facto* suspending Exmingua's Santa Margarita exploration license and precluding Exmingua from obtaining a Santa Margarita exploitation license.[1237]

413. In its Counter-Memorial, Respondent argues that there is an "absence of State conduct" in connection with Claimants' complaints about Exmingua's Santa Margarita license.[1238] In respect of Claimants' explanation that the MEM's refusal to conduct court-ordered consultations for Exmingua's

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[1231] *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award dated 22 Aug. 2017 ¶ 550 (CL-0217).

[1232] *Id.* ¶ 645.

[1233] *Id.* ¶ 648.

[1234] Clms' Mem. § III.D; *see infra* § III.E.

[1235] Resp's C-M ¶¶ 511-526.

[1236] Clms' Mem. § III.D; *see infra* § III.E .

[1237] *Id.* ¶¶ 169-170.

[1238] Resp's C-M ¶¶ 527-528.

Progreso VII license to regain effectiveness had the effect of *de facto* suspending Exmingua's Santa Margarita exploration license and precluding it from obtaining an exploitation license, Guatemala contends that Claimants ought to have asked the "courts of justice of Guatemala to compel the MEM to make such recommendations."[1239] These objections are groundless.

414. *First*, there is no absence of State conduct. Specifically, it was the *State* – through the courts and the MEM – that suspended Exmingua's Progreso VII exploitation license unless and until, among other things, the MEM conducts ILO Convention 169 consultations. Moreover, the *State* – again through its courts – rendered a decision in the *Minera San Rafael* case indicating that *exploration*, as well as exploitation, licenses would be indefinitely suspended pending the MEM conducting consultations.[1240] Further, even absent that decision, it would be economically and legally irrational for an investor to conduct exploration when it had no hope of obtaining an exploitation license or could expect that any issued-license subsequently would be indefinitely suspended. As such, it was *State* action that was directly responsible for the *de facto*, indefinite suspension of Exmingua's Santa Margarita exploration license.

415. Likewise, *State* action is responsible for Exmingua's inability to obtain a Santa Margarita exploitation license. As noted, *for five years*, the MEM has failed to conduct the court-ordered consultations for Exmingua's Progreso VII exploitation license. Given that it would not do this for a former operating mine, it is apparent that the MEM would not conduct consultations in order to issue Exmingua an exploitation license for Santa Margarita. Even assuming *arguendo* that the MEM would do so *without* conducting consultations, it is apparent that the same license would meet the same fate as that of the Progreso VII license.

416. Furthermore, the *State* took additional action to preclude Exmingua from obtaining its Santa Margarita exploitation license by rejecting Exmingua's requests for assistance and guidance in conducting its own consultations for the social studies needed to complete its EIA.[1241] The MEM then imposed an arbitrary deadline of 30-days for Exmingua to submit its completed EIA, and refused to extend that deadline when Exmingua explained that the protests and blockades made compliance impossible.[1242] All of this *State* action was in keeping with the *State's de facto* moratorium on issuing

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[1239] *Id.* ¶ 529.

[1240] Clms' Mem. ¶ 169.

[1241] *See supra* § II.D.3; Clms' Mem. ¶ 121.

[1242] *See supra* § II.D.3; Clms' Mem. ¶¶ 122-123.

new mining licenses.[1243] Guatemala's objection that Claimants have not identifed any State action responsible for the deprivation in value of Exmingua's property interests in its Santa Margarita license and its inability to obtain an exploitation license is thus belied by the evidence.

417. *Second*, Respondent's suggestion that it cannot be held responsible for an expropriation in relation to the Santa Margarita property interests, because Claimants did not bring suit in Guatemalan court seeking to compel the MEM to conduct consultations is wrong. Its argument seeks to impose a requirement that Claimants exhaust local remedies before pursuing arbitration, which has no basis under the Treaty[1244] or the ICSID Convention.[1245] Respondent's reliance on *Generation Ukraine Inc. v. Ukraine* in this regard[1246] is ineffective. In that case, the tribunal rejected the investor's expropriation claim, noting that a municipal authority's failure to issue amended lease agreements was unlikely to be expropriatory when such inaction was not challenged by the investor.[1247] That case, however, has been criticized for seeking to impose an exhaustion requirement on the claimant,[1248] and its approach has not been endorsed by other ICSID tribunals.[1249] In any event, its facts are not at all analogous, as the MEM's action *was* challenged in court (by CALAS) and the MEM has been under court orders to perform the consultations for more than five years, with the last court decision in June 2020 imposing a one-year deadline for the MEM to complete consultations.[1250] Exmingua, notably, also commenced court action against various organs of the State seeking to compel them to protect its property and eliminate the blockade, so it could conduct the consultations for the Santa Margarita EIA and, yet, the court dismissed Exmingua's *amparo* on the grounds that its

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[1243] *See supra* § II.D.3; Clms' Mem. ¶¶ 119, 124.

[1244] *David Aven and others v. Costa Rica*, ICSID Case No. UNCT/15/3, Final Award dated 18 Sep. 2018 ¶ 356 (RL-0031) ("DR-CAFTA does not require prior exhaustion of internal remedies as a requirement of admissibility to access international investment arbitration.").

[1245] *See* ICSID Convention, Art. 26.

[1246] Resp's C-M ¶ 529.

[1247] *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 Sept. 2003 ¶¶ 20.31, 20.33 (RL-0100).

[1248] *Helnan Int'l Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee dated 14 June 2010 ¶ 49 (CL-0352) ("[T]he Award in *Generation Ukraine* . . . stands somewhat outside the *jurisprudence constante* under the ICSID Convention in the review of administrative decision-making for failure to provide fair and equitable treatment. . . . [I]t does not follow at all from [the Generation Ukraine tribunal's] conclusion that, in order to succeed in a claim of failure to provide fair and equitable treatment based on a *Ministerial* decision, the investor must challenge that decisionin the local administrative courts.") (emphasis in original).

[1249] *Middle East Cement Shipping and Handling Co. SA v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award dated 12 Apr. 2002 ¶ 170 (CL-0137); Rudolf Dolzer, *Local Remedies in International Treaties: A Stocktaking, in* DAVID D. CARON ET AL, PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 280, 283 (2015) (CL-0351) ("Thus, for the first time, a tribunal had decided to require the exhaustion of local remedies in a contractual dispute, albeit adding that there was no duty to exhaust local remedies…[i]n effect, the local remedies rule is read back into the ICSID Convention; in the words of the ad hoc committee in *Helnan*, the Award 'stands somewhat outside of the *jurisprudence constante* under the ICSID Convention'.") (emphasis in original).

[1250] Constitutional Court of Guatemala, Case No. 1592-2014, Notification of 11 June 2020 ruling dated 23 June 2020 (C-0495).

Progreso VII license was suspended.[1251] In such circumstances, Respondent's suggestion that Claimants cannot challenge the State's conduct as expropriatory before instigating court action to compel the MEM to comply with court orders or obtain assistance for its EIA consultations is made in bad faith.

5. Guatemala's Conduct Qualifies As An Unlawful Expropriation

418. Claimants set out in their Memorial how Guatemala's actions and omissions constituted an indirect expropriation, including with reference to the relevant criteria under Annex 10-C.4 of the Treaty.[1252] In particular, Claimants demonstrated how Guatemala's conduct rendered their investments in Exmingua worthless by depriving them of the opportunity to develop and operate the mining Project at Tambor,[1253] that such deprivation was sufficiently permanent in nature,[1254] and amounts to an interference with their reasonable, investment-backed expectations.[1255] Claimants also showed that the character of Guatemala's measures was unlawful and discriminatory, confirming their expropriatory nature.[1256] Finally, Claimants highlighted the unlawful nature of Guatemala's expropriation, since Guatemala failed to compensate Claimants, its conduct was discriminatory and lacked due process, and was not motivated by a public purpose.[1257]

419. In its Counter-Memorial, Guatemala argues that its measures did not substantially deprive Claimants of their rights,[1258] did not have a permanent effect,[1259] that Claimants did not possess any distinct, reasonable investment-backed expectations.[1260] Relying on Annex 10-C of the Treaty, Guatemala also claims that the challenged measures are non-discriminatory regulatory actions to protect legitimate public welfare objectives, which it has a wide margin of discretion to apply.[1261]

420. As demonstrated below, all of Respondent's acts and omissions, by the MEM, the MARN, the President, the National Police, and the Courts, among others, together worked to expropriate

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[1251] Clms' Mem. ¶ 118.
[1252] *Id.* § III.A.
[1253] *Id.* ¶¶ 148-158, 167-172.
[1254] *Id.* ¶¶ 159-164, 186.
[1255] *Id.* ¶¶ 173-179.
[1256] *Id.* ¶¶ 180-186.
[1257] *Id.* ¶¶ 187-200.
[1258] Resp's C-M ¶¶ 531-537.
[1259] *Id.* ¶¶ 538-555.
[1260] *Id.* ¶¶ 556-557.
[1261] *Id.* ¶¶ 568-586.

Claimants' investments. A creeping expropriation, as the tribunal in *Siemens v. Argentina* recognized, takes place over time, and each step independently need not have an expropriatory effect:

> By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break.[1262]

421. In its attempt to singularly isolate its conduct in relation to the unlawful seizure and impounding of Exmingua's gold concentrate,[1263] Respondent's approach contravenes this well-established jurisprudence.[1264] Moreover, by its insistence on the flawed premise that any evaluation of a Guatemalan court's decision by this Tribunal is only permissible in the context of "a denial of justice and collusion,"[1265] Respondent tries to evade international responsibility merely because some of the actions in the chain of indirect expropriation are judicial acts.

[1262] *Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, Award dated 6 Feb. 2007 ¶ 263 (CL-0159); *see also Biloune v. Ghana*, UNCITRAL, Award on dated 27 Oct. 1989 ¶ 81 (CL-0353) ("What is clear is that the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr Biloune without possibility of re-entry had the effect of causing the irreparable cessation of work on the project. Given the central role of Mr Biloune in promoting, financing and managing MDCL, his expulsion from the country effectively prevented MDCL from further pursuing the project. In the view of the Tribunal, such prevention of MDCL from pursuing its approved project would constitute constructive expropriation of MDCL's contractual rights in the project and, accordingly, the expropriation of the value of Mr Biloune's interest in MDCL, unless the Respondents can establish by persuasive evidence sufficient justification for these events."); *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica,* ICSID Case No. ARB/96/1, Award dated 17 Feb. 2000 ¶ 76 (CL-0134) ("It is clear, however, that a measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title. What has to be identified is the extent to which the measures taken have deprived the owner of the normal control of his property. A decree which heralds a process of administrative and judicial consideration of the issue in a manner that effectively freezes or blights the possibility for the owner reasonably to exploit the economic potential of the property, can, if the process thus triggered is not carried out within a reasonable time, properly be identified as the actual act of taking."); *Oxus Gold v. Uzbekistan*, ICSID Case No. Final Award dated 17 Dec. 2015 ¶ 740 (CL-0291) ("Contrary to what happens with a direct expropriation, where the goal of the legal act performing the expropriation is precisely to take a property, in case of indirect expropriation, there is a State law or regulation, or sometimes some behaviour, – the purpose of which was not to take the property but the effect was just that. Such indirect expropriation can result from a single act or a series of acts. In this latter case, it is considered as a creeping expropriation, which is a process extending in time and comprising a succession of measures that, taken separately, do not have the effect of dispossessing the investor but when taken together do lead to such a result."); *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award dated 4 Apr. 2016 ¶ 669 (CL-0153) ("State responsibility for creeping expropriation is reflected in the concept of a composite act, as defined in Article 15(1) of the ILC's Articles on State Responsibility.").

[1263] Resp's C-M ¶¶ 524-526.

[1264] *See, e.g.*, Resp's C-M ¶ 554, where it attempts to show no substantial deprivation by reference to the fact that the impounded gold concentrate constituted a fraction of the total gold sales of Exmingua over the 1.5 year period of its operations.

[1265] *Id.* ¶¶ 524-526.

422. Similar to *Vivendi v. Argentina*, Guatemala's conduct towards Claimants' investments in Exmingua are reminiscent of the "illegitimate 'campaign'"[1266] that the tribunal in that case found Argentina to have pursued against the foreign concessioniare claimant – which when considered together leads to an inexorable conclusion of indirect expropriation.

a. Respondent's Measures Have Deprived Claimants of All Of The Value Of Their Investment

423. In their Memorial, Claimants set out that Guatemala rendered their investments in Exmingua worthless by indefinitely suspending the Progreso VII exploitation license and preventing Exmingua from carrying out mining operations (cutting off its only stream of revenue), suspending its exportation certificate, unlawfully seizing its concentrate and pursuing spurious criminal charges, *de facto* suspending its Santa Margarita's exploration license, and precluding the issuance of the Santa Margarita exploitation license.[1267] Claimants also explained that the loss of all or nearly all value was an essential factor in determining whether an expropriation has occurred.[1268]

424. In its Counter-Memorial, Respondent criticizes Claimants for relying on cases that it says "pivot on" the "sole effects" doctrine, on the basis that Annex 10-C.4 "enjoins" the Tribunal to "consider the character of the government action involved which includes, among others, assessing whether the State or a private party benefitted from the alleged interference."[1269] Respondent then relies on U.S. takings jurisprudence to argue that a dimunition in property value "standing alone" cannot establish an expropriation and that this principle is applied similarly in the "international investment regime," by reference to the decisions in *Al-Warraq v. Indonesia*, *Pope & Talbot Inc. v. Canada*, *Enron v. Argentina*, and *CMS v. Argentina*.[1270] Respondent also asserts that due to Claimants' retention of "corporate control over Exmingua and its business," any finding of expropriation will be "defeat[ed]."[1271]

425. As a factual matter, Claimants did not only show the destruction of the economic value of their investments in Exmingua, but also demonstrated that Guatemala's actions and omissions

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[1266] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award dated 20 Aug. 2007 ¶ 7.4.19 (CL-0142).

[1267] Clms' Mem. ¶¶ 167-172.

[1268] *Id.* ¶¶ 148, 172.

[1269] Resp's C-M ¶ 533. To similar effect is United States' argument that "an adverse economic impact 'standing alone, does not establish that an indirect expropriation has occurred.'" *See* US NDP Submission ¶ 43.

[1270] *Id.* ¶¶ 535-536 (citing cases).

[1271] *Id.* ¶ 537. *See also*, Resp's C-M ¶¶ 476-482, where it echoes a similar argument that since Exmingua retained control of its management decisions, Claimants have no basis to argue that Guatemala has interfered with Claimants' shares in Exmingua.

constituted an unlawful expropriation by reference to the other factors set out in DR-CAFTA Annex 10-C.4 and Article 10.7.1.[1272] As a legal matter as well, Respondent's arguments are without merit, as shown below.

426. *First*, as Christoph Schreuer aptly states, "[j]udicial practice indicates that the severity of the economic impact is the *decisive criterion* when it comes to deciding whether an indirect expropriation or a measure tantamount to expropriation has taken place."[1273] Professor Rudolf Dolzer concurs that "[n]o one will seriously doubt that the severity of the impact upon the legal status, and the practical impact on the owner's ability to use and enjoy his property, will be a *central factor* in determining whether a regulatory measure effects a taking."[1274] As the tribunal in *Glamis Gold v. United States*, in considering the same criteria as set out in Annex 10-C.4, likewise observed:

> There is for all expropriations, however, the *foundational threshold inquiry* of whether the property or property right was in fact taken…. In the case of an indirect taking or an act tantamount to expropriation such as by a regulatory taking, however, the threshold examination is an inquiry as to the degree of the interference with the property right. This *often dispositive inquiry* involves two questions: the severity of the economic impact and the duration of that impact.[1275]

Therefore, Claimants' reliance upon cases that emphasize the economic impact of the measure in assessing whether there has been an expropriaton is appropriate. Indeed, giving prominence to the economic impact of the measure does not mean that the existence of a legitimate public purpose is irrelevant to the assessment of whether there has been an expropriation;[1276] in fact, the "[a]bsence of legitimate purpose would inject an element of illegality that should lead to an award of damages which would be conceptually different from and possibly higher than compensation."[1277] Here,

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[1272] Clms' Mem., § III.A.2.

[1273] Schreuer, Part 1 – Rapport, The Concept of Expropriation under the ECT and Other Investment Protection Treaties, Chapter 3, *Investment Arbitration and The Energy Charter Treaty*, edited by Clarisse Ribeiro, JurisNet, 2006, 144, 158 (C-0382) (emphasis added).

[1274] Rudolf Dolzer, *Indirect Expropriations: New Developments?* 11 N.Y.U. Environmental Law Journal 64, 79 (2002) (C-0383) (emphasis added).

[1275] *Glamis Gold, Ltd. v. United States of America,* NAFTA/ UNCITRAL, Award dated 8 June 2009 ¶ 356 (RL-0041) (emphasis added). The parties in the case had made arguments with reference to the same three-prong test as set out in the 2004 US Model BIT before the tribunal.

[1276] *See* Clms' Mem. § III.A.3.

[1277] Schreuer, Part 1 – Rapport, The Concept of Expropriation under the ECT and Other Investment Protection Treaties, Chapter 3, *Investment Arbitration and The Energy Charter Treaty*, edited by Clarisse Ribeiro, JurisNet, 2006, p. 144–58 (C-0382).

Claimants have demonstrated the unlawful nature of Respondent's indirect expropriation by reference to, among other things, the lack of a public purpose underlying its conduct.[1278]

427. *Second*, Respondent is incorrect to assert that Annex 10-C.4 "enjoins" the Tribunal to "consider the character of the government action" and that this inquiry involves "assessing whether the State or a private party benefitted from the alleged interference."[1279] To the contrary, it is "widely accepted" that an expropriation may take place "without a corresponding gain or 'appropriation' on part of the state."[1280]

428. *Third*, Respondent's reliance on U.S. takings jurisprudence is misplaced, as it is inapplicable to treaty-based expropriation claims.[1281] In any event, even if the Tribunal were to evaluate the magnitude of the economic impact by reference to the threshold in *Penn Central*,[1282] Claimants have met the onerous burden of demonstrating that Guatemala's actions "make it commercially impracticable…to continue"[1283] to use and enjoy its investments in Exmingua as anticipated.

429. *Fourth,* even the cases cited by Respondent are consistent with the conclusion that "substantial deprivation" is key for a finding of indirect expropriation. In *Pope & Talbot Inc. v. Canada*, for instance, it was determinative for the tribunal that, despite Canada's interference, the investment "continue[d] to export substantial quantities of softwood lumber to the U.S. and to earn substantial profits on those sales."[1284] Here, Claimants have demonstrated how Exmingua's operations have been brought to a complete standstill as a result of Guatemala's actions and omissions[1285] – a far cry from the "substantial profits" that weighed against a finding of indirect expropriation in *Pope & Talbot*.

430. Moreover, Respondent's attempts to selectively rely upon the decision in *Al-Warraq v. Indonesia*, arguing that the tribunal did not find an expropriation because the claimant investor had not been "totally or partially deprived … of [his] shares in Bank Century", "his basic rights in the

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[1278] Clms' Mem. ¶¶ 197-200.

[1279] Resp's C-M ¶ 533.

[1280] AUGUST REINISCH & CHRISTOPH SCHREUER, INTERNATIONAL PROTECTION OF INVESTMENTS: THE SUBSTANTIVE STANDARDS, CUP 2020 71 (CL-0384). *See also*, Clms' Mem. ¶ 148 fn 364 (citing cases).

[1281] *See supra* § III.B.1.

[1282] *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978) (RL-0238).

[1283] *Id.*

[1284] *Pope & Talbot Inc. v. Canada*, NAFTA, UNCITRAL, Interim Award dated 26 Jun. 2000 ¶¶ 101-102 (CL-0129).

[1285] Clms' Mem. ¶¶ 167-172.

exercise of his ownership" of the shares, nor of his "actual control" over the shares[1286] is misguided, as Respondent fails to appreciate that this was the particular language set out in Article 10(1) of the OIC treaty that the tribunal was tasked with interpreting.[1287]

431. *Finally*, Claimants' control over Exmingua is irrelevant to their demonstration that they have suffered an indirect expropriaton. As Professors Schreuer and Dolzer confirm, "an approach that looks exclusively at control over the overall investment is unable to contemplate the expropriation of specific rights enjoyed by the investor."[1288] Indeed, "[l]oss of control is…a factor that is alternative to destruction of value."[1289] This is made clear by the text of the Treaty, which requires "a case-by-case, fact-based inquiry," involving a consideration of *multiple* factors, for the determination of whether there has been an indirect expropriation.[1290] Thus, there have been many cases where tribunals have found indirect expropriations notwithstanding that the investor remained in control of its investment. For example, in *CME v. Czech Republic*, the tribunal held that the Czech Republic's

> view that the Media Council's actions did not deprive the Claimant of its worth, as there has been no physical taking of the property by the State or because the original Licence granted to CET 21 always has been held by the original Licensee and kept untouched, is irrelevant. What was touched and indeed destroyed was the Claimant's and its predecessor's investment as protected by the Treaty. What was destroyed was the commercial value of the investment in ČNTS by reason of coercion exerted by the Media Council against ČNTS in 1996 and its collusion with Dr. Železný in 1999."[1291]

[1286] *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Final Award dated 15 Dec. 2014 ¶ 524 (CL-0273) (emphasis omitted) – relied upon in Resp's C-M ¶ 536.

[1287] *Id.* ¶ 291 (quoting the OIC Treaty, Article 10(1),"The host state shall undertake not to adopt or permit the adoption of any measure -- itself or through one of its organs, institutions or local authorities -- if such a measure may directly or indirectly affect the ownership of the investor's capital or investment by depriving him totally or partially of his ownership or of all or part of his basic rights or the exercise of his authority on the ownership, possession or utilization of his capital, or of his actual control over the investment, its management, making use out of it, enjoying its utilities, the realization of its benefits or guaranteeing its development and growth.").

[1288] RUDOLF DOLZER & CHRISTOPH SCHREUR, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 118 (2nd ed. 2012) (CL-0131) ("Control is obviously an important aspect in the analysis of a taking. However, the continued exercise of control by the investor in itself is not necessarily the sole criterion. The issue becomes obvious when a host state *substantially deprives the investor of the value of the investment leaving the investor with control of an entity that amounts to not much more than a shell of the former investment*. This illustrates the significance of a test which includes criteria other than control, such as economic use and benefit. Any attempt to define an indirect expropriation on the basis of one factor alone will not lead to a satisfactory result in all cases. In particular, an *approach that looks exclusively at control over the overall investment is unable to contemplate the expropriation of specific rights enjoyed by the investor*.") (emphases added).

[1289] UNCTAD, EXPROPRIATION, at 67 (UNCTAD Series on Issues in International Investment Agreements II, 2012) (CL-0132). *See, Sempra v. Argentina*, ICSID Case No. ARB/02/16, Award dated 28 Sept. 2007 ¶ 285 (CL-0258) ("A finding of indirect expropriation would require…that the investor no longer be in control of its business operation, or that the value of the business have been virtually annihilated.").

[1290] DR-CAFTA, Annex 10-C.4 (CL-0001).

[1291] *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award dated 13 Sept. 2001 ¶ 591 (CL-0052).

The tribunal in *Bahgat v. Egypt* likewise held that the claimant's possession of shares in its local subsidiary companies did not "exclude the possibility of qualifying [respondent's] measures against [claimant] as indirect expropriation."[1292]

b. Claimants' Substantial Deprivation Is Not Ephemeral

432. As set out in their Memorial, Claimants' substantial deprivation meets the criterion of permanence for an indirect expropriation.[1293] As Claimants explained, as of the time they filed their Memorial, Exmingua's exploitation license for Progreso VII had remained suspended for four years, its Santa Margarita exploration license had been *de facto* suspended for that same amount of time, it remained precluded from obtaining an exploitation license for the Santa Margarita area, and its concentrate remained unlawfully impounded.[1294] Claimants showed how this level of deprivation was of such a nature so as to constitute an expropriation.[1295]

433. In its Counter-Memorial, Respondent argues that all of its impugned conduct comprises temporary measures that do not suffice for a finding of indirect expropriation,[1296] because Exmingua's Progreso VII exploitation license is purportedly merely suspended and has not been revoked.[1297] It then challenges Claimants' characterization of this suspension as being of an indefinite period on the basis that the 11 June 2020 decision of the Constitutional Court "explicitly contemplates the 'resumption of the works'…upon satisfaction of the conditions," which include, *inter alia*, timelines for the MEM to carry out consultations with the indigenous people impacted by the Tambor Project.[1298] No doubt recognizing that it cannot avoid the fact that the MEM has *not* complied with the timelines set forth by the Court, Guatemala in its Counter-Memorial goes so far as to fault Claimants, noting that Exmingua could seek recourse to the courts to compel action by the MEM.[1299] Finally, in support of its arguments that Claimants' deprivation has not lasted long enough to constitute an expropriation, Guatemala again invokes U.S. jurisprudence[1300] and refers to cases where

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[1292] *Mohamed Abdel Raouf Bahgat v. The Arab Republic of Egypt*, PCA Case No. 2012-07, Final Award dated 23 December 2019, ¶ 227 (CL-0343); *see also, Eureko B.V. v. Republic of Poland*, UNCITRAL Partial Award dated 19 Aug. 2005 ¶¶ 239-243 (CL-0125).

[1293] Clms' Mem. ¶¶ 159-164.

[1294] *Id.* ¶¶ 165-166, 172.

[1295] *Id.* ¶¶ 159-163, 172.

[1296] Resp's C-M ¶¶ 538-555.

[1297] *Id.* ¶¶ 543-548.

[1298] Resp's C-M ¶ 545.

[1299] *Id.* ¶ 546.

[1300] *Id.* ¶¶ 538, 540, 542.

tribunals have found the requirement of permanence to not have been met.[1301] Respondent's arguments are wrong, as shown below.

434. *First*, Respondent cannot hide behind the Courts' order of suspension, rather than revocation, as a defense to Claimants' expropriation claim. As Claimants demonstrated in their Memorial, there is "no specific time set under international law for measures constituting creeping expropriation to produce that effect. It will depend on the specific circumstances of the case."[1302] In the circumstances of this case, in the time that has passed since Claimants' Memorial was filed, Exmingua's Progreso VII exploitation license still remains suspended, and the MEM has not even taken any steps towards completing the consultations that it was ordered to conduct.[1303] Nor has anything changed vis-à-vis the Santa Margarita *de facto* suspension, and Respondent's subsequent actions concerning the impounded concentrate and frozen bank accounts only add to a showing of the unlawfulness of its conduct.[1304] This further confirms the non-temporary nature of the complete deprivation of value suffered by Claimants.

435. Moreover, as Claimants demonstrated in their Memorial by reference to the decisions in *Tza Yap Shum v. Peru* and *Wena Hotels v. Egypt*, the subsequent restructuring or even return of an investment does not necessarily take away from the non-ephemeral nature of an indirect expropriation.[1305] Here, in fact, there is *no* indication that Exmingua will regain the use of its licenses or be able to enjoy the benefits of its concentrate by exporting it.[1306] Indeed, Guatemala's implication that Exmingua ought to commence proceedings against the MEM to compel it to fulfill its legal obligations[1307] is an implicit acknowledgment that the MEM has no intention of conducting the consultations and restoring Exmingua's licenses and, thus, proves the non-ephemeral nature of the State's unlawful conduct.

[1301] *Id.* ¶¶ 539-540.

[1302] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award dated 14 July 2006 ¶ 313 (CL-0149); *see also*, Clms' Mem. ¶ 159.

[1303] *See supra* § II.D.4.

[1304] *See supra* § II.D; See supra §§ II.D.3, II.D.5.

[1305] Clms' Mem. ¶¶ 162-163.

[1306] *See*, *Valeri Belokon v. Krygyz Republic*, UNCITRAL, Award dated 24 Oct. 2014 ¶¶ 207-208 (CL-0355) (set aside on factual findings of money laundering against Manas Bank – which had been considered but dismissed by the tribunal) ("The Tribunal has been provided no assurances by the Respondent that this temporary administration will soon be at an end. To the contrary, the Tribunal understands that the temporary administration must be imposed while there is an ongoing investigation against the Claimant and the personnel of Manas bank….the Respondent has been unable to explain the legal basis for the continuing application of the sequestration regime to Manas Bank. In effect, there is no reason to expect that the sequestration administration of Manas Bank will terminate in a foreseeable future.")

[1307] *See* Resp's C-M ¶ 546.

436. *Second*, Respondent's reliance on U.S. jurisprudence and investment treaty cases is unavailing. As to the former, as shown above, U.S. jurisprudence does not inform the interpretation of the Treaty.[1308] Nor do the investment treaty cases invoked by Guatemala support its position.

437. As noted in the Memorial, investment tribunals have found loss of control of property for a year[1309] and a suspension of a license for four months[1310] to be of sufficient duration to constitute an expropriation. As a further example, in the *Belokon v. Krygyz Republic* case, the tribunal found that the imposition of an administration and sequestration regime on Manas Bank (the claimant's investment) "with no end in sight, for a period of at least four years" amounted to an indirect expropriation.[1311] Notably, in that case, the Kyrgyz National Bank had extended the temporary administration beyond the prescribed limits under Kyrgyz law.[1312] The same is the case here: apart from the fact that Guatemala acted in violation of its own law in suspending Claimants' licenses, it is indisputable that the Courts consistently failed to act within the legally-prescribed timeframes and the MEM likewise has failed to conduct the consultations within the prescribed timeframe ordered by the Court.[1313]

438. More recently, the tribunal in *Bahgat v. Egypt* found that measures lasting for six years constituted an expropriation:

> The Parties dispute whether the measures have to be irreversible to qualify as indirect expropriation. The Tribunal does not consider it necessary to decide on that matter. In its view, *no possibility exists to undo the negative impact that the lost 6 years had on Claimant's investment*. The Tribunal is aware that the mining concession of

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[1308] *See supra* § III.A.1

[1309] *See Inmaris Perestroika Sailing Maritime Services GmbH and ors v. Ukraine*, ICSID Case No. ARB/08/8, Award dated 1 Mar. 2012 ¶ 300 (CL-0356) ("As described above, the Tribunal finds that the telegram instructing [X] not to let the ship leave the territorial waters of Ukraine, and the continuation of the travel ban for the ensuing year, was a sovereign act taken by Respondent. That act deprived Claimants of access to and control over the essential asset for its investment, i.e., the ship, and thus of Claimants' contractual rights to use that asset. While Respondent asserts that any deprivation was merely temporary because the travel ban was lifted after *one year*, the damage to the investment had by that time been done. An entire sailing season was cancelled, and Claimants' business suffered substantial harm such that they could not reasonably have been expected to resume operations as if nothing had happened. Indeed, at that stage, two of the Claimants were in insolvency proceedings, and, even if those entities had remained solvent, it is not reasonable to assume that customers would be willing to work with them in light of these events."). *See also Wena Hotels Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award dated 8 Dec. 2000 ¶ 99 (CL-0151). Respondent appears to give a self-serving reading to *Wena*, arguing that the "controlling factor" was not that there was a deprivation of one year, but that "the government, through EHC, had possession of the property." *See* Resp's C-M ¶ 541.

[1310] *See Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award dated 12 Apr. 2002 ¶ 107 (CL-0137).

[1311] *Valeri Belokon v. Krygyz Republic*, UNCITRAL, Award dated 24 Oct. 2014 ¶ 215 (CL-0355) (set aside on factual findings of money laundering against Manas Bank – which had been considered but dismissed by the tribunal).

[1312] *Id.* ¶¶ 207-210.

[1313] *See supra* §§ II.D.1.a.vi, II.D.4; *infra* §§ III.C and III.E.

> ADEMCO is still valid. *However, of the 30 years of its duration, due to the standstill of all business between February 2000 and the final rehabilitation of Claimant, 6 years had elapsed*.[1314]

439. In response, Respondent's reliance upon *S.D. Myers v. Canada* is unavailing.[1315] There, the tribunal held that a 16-month border closure, during which time the claimant's invesmtent could not export materials to the United States, was insufficient to constitute an expropriation.[1316] The measures in this case and their impact on Claimants bear no resemblance to a 16-month ban on exports, which was reversed by the time claimants filed for arbitration and which merely had the effect of postponing claimant's foray into the Canadian market by a few months.[1317] Indeed, while finding the measures to be non-expropriatory, the *S.D. Myers* tribunal nonetheless recognized that, in other circumstances, "it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary."[1318]

c. Respondent's Measures Interfered With Claimants' Distinct, Reasonable Investment-Backed Expectations

440. As Claimants demonstrated in their Memorial with the support of Professor Fuentes' opinion, Guatemala measures contravened their reasonable investment-backed expectations that Exmingua would be able to continue operations on the basis of the Progreso VII exploitation license, that its concentrate would not be unlawfully seized, and that it would be able to obtain an exploitation license for Santa Margarita.[1319]

441. Respondent attempts to counter this, again, by improperly seeking to borrow jurisprudence from U.S. takings cases.[1320] It also relies on investment treaty cases interpreting legitimate expectations in the context of an FET claim, and arguing that Claimants have not shown any "specific inducements" by Guatemala.[1321] Guatemala then acknowledges that it has not enacted any statutes or regulations implementing ILO Convention 169, but makes the absurd argument that this alleged lack of regulation should have prompted Claimants to obtain specific assurances from Guatemala that the

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[1314] *Mohamed Abdel Raouf Bahgat v. The Arab Republic of Egypt*, PCA Case No. 2012-07, Final Award dated 23 Dec. 2019 ¶ 228 (CL-0343) (emphasis added).

[1315] Resp's C-M ¶ 539.

[1316] *S.D. Myers, Inc. v. Government of Canada,* NAFTA, UNCITRAL, Partial Award dated 13 Nov. 2000 ¶ 284 (CL-0104).

[1317] *Id.* ¶¶ 12, 127. Claimants in that case filed the Notice of Arbitration on 30 October 1998, while the export ban was in place between 20 November 1995 and February 1997.

[1318] *Id.* ¶ 283 (CL-0104).

[1319] Clms' Mem. ¶¶ 173-179; Fuentes I ¶¶ 37, 48, 55, 81, 168, 191-193.

[1320] Resp's C-M ¶ 558.

[1321] *Id.* ¶¶ 559-561.

"consultation requirement" would not be required for the issuance of the exploitation license and that Guatemala would "not *ever* require prior consultations."[1322] Respondent then argues by reference to *SolEs Badajoz v. Spain* that it was incumbent upon Claimants to carry out their own "diligence," in the absence of an environmental and social diligence review in the CAM Report and in light of certain statements in Radius' press releases regarding its corporate strategy to divest of "problematic assets."[1323] Respondent then tries to walk away from the position it has taken before the IAHCR regarding the compliance of the public participation process under Guatemala's Mining Law with ILO Convention 169, arguing that it has not made it "public" and that it does not amount to an "inducement[ ] to invest."[1324] Finally, Respondent reiterates its arguments that Claimants lacked legitimate expectations that Exmingua would obtain an exploitation license for Santa Margarita.[1325] As demonstrated below, Guatemala's arguments are meritless.

442. *First*, as already shown, Respondent's reliance on U.S. jurisprudence is misplaced, as it is the terms of the Treaty, governed by customary international law, that apply. In any event, under U.S. law, the "spirit of this factor" requires that the government compensate an owner of property when governmental regulation has an extreme impact on property value.[1326] As a matter of international law, "contracts and licences" are considered to be "[o]bvious examples of [reasonable investment-backed] expectation-creating commitments."[1327] In *Deutsche Bank v. Sri Lanka*, the tribunal held that the claimant had "a legitimate expectation that a validly concluded hedging agreement" would be in force in Sri Lanka and that "its contractual rights would not later be interfered with by a regulator which was essentially an interested party to the transaction".[1328]

443. *Second*, Guatemala errs in relying on investment treaty jurisprudence interpreting the concept of legitimate expectations in the context of the FET standard to interpret the reasonable, investment-backed expectations factor set forth in the Treaty's Annex as relevant for the determination of whether

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[1322] *Id.* ¶ 562 (emphasis added).

[1323] *Id.* ¶¶ 562-563.

[1324] *Id.* ¶ 564.

[1325] *Id.* ¶¶ 565-567.

[1326] *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 127 (1978) (RL-0238) (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922)).

[1327] Jan Paulsson, *Indirect Expropriation: Is the Right to Regulate at risk?* TRANSNATIONAL DISPUTE MANAGEMENT VOL. 3(2), 3 (2006) (CL-0357) ("First among these is the notion of "reasonable investment-backed expectations" – not my favourite phrase but so often repeated that it cannot be ignored. Many will prefer the *Methanex* formulation: 'specific commitments … given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.' Obvious examples of such expectation-creating commitments are contracts and licences. But there are other circumstances, presumably exceptional, where "policies in force earlier might have created legitimate expectations both of a procedural and substantive nature.").

[1328] *Deutsche Bank AG v. Sri Lanka*, Award dated 31 Oct. 2012 ¶ 523 (CL-0127).

there has been an indirect expropriation.[1329] The relevant standard for inquiring as to whether a claimant had reasonable, investment-backed expectations in the context of an expropriation analysis is that set out by the tribunal in *Tecmed v. Mexico*:

> There is no doubt that, even if Cytrar did not have an indefinite permit but a permit renewable every year, the Claimant's expectation was that of a long-term investment relying on the recovery of its investment and the estimated return through the operation of the Landfill during its entire useful life. … [E]ven before the Claimant made its investment, it was widely known that the investor expected its investments in the Landfill to last for a long term and that it took this into account to estimate the time and business required to recover such investment and obtain the expected return upon making its tender offer for the acquisition of the assets related to the Landfill. To evaluate if the actions attributable to the Respondent —as well as the Resolution— violate the Agreement, such expectations should be considered legitimate and should be evaluated in light of the Agreement and of international law.[1330]

Claimants, thus, do not need to show any "inducements to invest"[1331] to establish that they had reasonable, investment-backed expectations. Nor is this a case where there was a "reasonable extension" of pre-existing regulations. At its core, the inquiry concerns "stability," which in this context means "reliance on a regulatory and business environment which does not fundamentally change during the course of the investment with the ultimate effect of jeopardizing the reasonable expectations of the investor."[1332]

444. Claimants invested in Exmingua – which had a 25-year exploitation license for Progreso VII and legitimate confidence that it was going to convert its existing exploration license into an exploitation license for Santa Margarita.[1333] For a period of over 1.5 years, Exmingua successfully mined gold ore in a plant designed, built and assembled by Claimants, and exported gold concentrate

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[1329] *See, e.g.,* Resp's C-M ¶¶ 560-561 discussing *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award dated 8 June 2009, ¶¶ 766-767 (RL-0041) ("[A]s the Tribunal has explained in its discussion of the [FET] legal standard, a violation of Article 1105 based on the unsettling of reasonable, investment-backed expectation requires, as a threshold circumstance, at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment…There did not exist, therefore, the quasi-contractual inducement that the Tribunal has found is a prerequisite for consideration of a breach of Article 1105(1) based upon repudiated investor expectations.").

[1330] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003 ¶¶ 150-151 (CL-0122); *see also Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award dated 14 July 2006 ¶ 318 (CL-0149).

[1331] Resp's C-M ¶¶ 564, 566.

[1332] Anne K. Hoffmann, *Indirect Expropriation*, *in* STANDARDS OF INVESTMENT PROTECTION 162 (August Reinisch ed., 2008) (CL-0378).

[1333] Clms' Mem. ¶¶ 173-179.

through a broker with whom it had a long-term contract.[1334] Exmingua had also prepared its Santa Margarita EIA, but for the social studies, had conducted exploration on the license area, and had purchased land surface rights, to prepare for mining.[1335] Clearly then, Claimants had a "reasonable, investment-backed expectation" of continuing to operate the mine and to expand it, including onto the Santa Margarita license area. Having already complied with the pre-existing regulations under Guatemalan law for the procurement of Exmingua's exploitation license, it was reasonable for Claimants to expect that Exmingua would not be penalized by the suspension of its operations and precluded from obtaining an exploitation license for Santa Margarita due to the State's failure to conduct consultations under ILO Convention 169 and its *de facto* moratorium on issuing licenses.

445. *Third*, fully cognizant of how it has wilfully disregarded these expectations, Guatemala's admission that it has "to date" "not enacted any statute or issued any executive regulation implementing the ILO Convention 169" is telling.[1336] This somehow leads Respondent to the conclusion that Claimants should have "exercised enough due diligence to obtain a specific assurance or representation" to the effect that the "consultation requirement under ILO Convention 169 is indeed not required for the issuance of an exploitation license" and "Guatemala's executive, legislative, and judicial agencies would not ever require prior consultations to be conducted."[1337] No State would reasonably provide such specific commitments, nor were Claimants required to seek such commitments as part of any "due diligence". Further, Guatemala misses entirely the fact that the problem is not that it now requires "prior consultations," but that it has imposed that requirement *retroactively* on investors that were issued licenses years ago. In making its absurd argument, Respondent also conveniently ignores that prior consultations were, in fact, concluded as part of the Progreso VII EIA *and approved by the MARN*.

446. *Fourth,* Respondent's remarks that the CAM Report prepared for Radius in 2004 did not include any environmental, social or legal due diligence, and that Radius exited the Tambor Project are misconceived.[1338] The CAM Report was commissioned as a technical study to evaluate Tambor's mineral resources;[1339] it was not expected to comment on any other matters and, thus, has no bearing on Claimants' reasonable, investment-backed expectations regarding environmental, social or legal

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[1334] *Id.* ¶ 4.
[1335] *Id.* ¶¶ 20, 29, 56, 100, 242.
[1336] Resp's C-M ¶ 562.
[1337] *Id.* ¶ 562.
[1338] *Id.* ¶ 563.
[1339] CAM Technical Report dated 7 Jan. 2004, at 1.5 (C-0039).

issues. In addition, the Radius media release quoted by Respondent notes that Radius retained a right to royalties from the Project and remained "optimistic that commercial production will be achieved at Tambor and the Company will be reimbursed for the investment it has made in the region since discovering gold at Tambor in the year 2000."[1340]

447. *Fifth,* Claimants above have explained that Guatemala repeatedly and publicly announced to the international community that the EIA process under its Mining Law and regulations complied with its ILO 169 obligations.[1341] For Guatemala to now argue that Claimants' expectations of the same were unreasonable is therefore baseless, and its assertion that its position before the IAHCR was "not public"[1342] is wrong.[1343]

448. *Finally,* contrary to Respondent's assertions, and similar to the position in *Deustche Bank AG v. Sri Lanka*, Claimants had a reasonable expectation that, after complying with all necessary requirements under Guatemalan law, Exmingua would be entitled to use and benefit from its validly-issued Progreso VII exploitation license and its Santa Margarita exploration license, and obtain an exploitation license for Santa Margarita.[1344]

d. The Treaty Contains No Blanket Exception for Regulatory Actions Rendering Expropriatory Claims Non-Compensable

449. As set forth in their Memorial, Claimants explained that, in accordance with the Treaty, the "character" of the government action is one "among other factors" that need to be considered by the Tribunal in its "case-by-case, fact-based inquiry."[1345] In this regard, Claimants showed that the *de jure* and *de facto* suspension of Exmingua's Progreso VII exploitation license and Santa Margarita exploration license, respectively, and precluding Exmingua from obtaining a Santa Margarita exploitation license was arbitrary, unlawful, and discriminatory and sought to shift the effects of Guatemala's own failure to carry out ILO Convention 169 consultations onto Claimants.[1346] Claimants also showed that Respondent's measures were not justified by any emergency situation,

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[1340] Radius Press Release, Radius Gold Sells Interest in Guatemala Gold Property dated 31 Aug. 2012 (C-0223).
[1341] *See supra* § II.B.
[1342] *See supra* § II.B.
[1343] *See supra* §III.B.3.
[1344] Clms' Mem. ¶ 179; *see also Deutsche Bank AG v. Sri Lanka*, Award dated 31 Oct. 2012 ¶ 523 (CL-0127).
[1345] DR-CAFTA, Annex 10-C.4(a) (C-0001).
[1346] Clms' Mem. ¶¶ 180-186.

and that the arbitrary and unlawful nature of Guatemala's actions extended also to the unawarranted seizure of Exmingua's concentrate.[1347]

450. In its Counter-Memorial, Respondent yet again inappropriately relies on U.S. takings jurisprudence, which envisages the balancing of interests as between property rights and the government's need to protect the public interest, and argues that the language of Annex 10-C.4(b) attempts to "encapsulate" this understanding.[1348] Respondent also argues that its actions fall within Annex 10-C.4(b), because they are non-discriminatory[1349] and the consultation requirement is driven by legitimate public welfare objectives,[1350] which, it claims, leads to a finding that its measures constitute a non-compensable taking,[1351] purportedly consistent with the "police powers" exception.[1352] This, too, is incorrect.

451. *First*, as commentators and the United States observe, Annex 10-C.4(b) is not "meant to create *a blanket exception for regulatory measures,* which could 'create a gaping loophole in international protection against expropriation.'"[1353] Rather, the Annex is *observational* in nature, and, as the United States remarks, is "intended to provide tribunals with additional guidance in determining whether an indirect expropriation has occurred."[1354]

452. *Second*, Respondent's invocation of the "police power" doctrine is ill-fated. As the tribunal in *Saluka v. Czech Republic* observed, the "'police power' exception is not absolute," and its contours ill-defined:

> [I]nternational law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered 'permissible' and 'commonly accepted' as falling within the police or regulatory power of States and, thus, non-compensable. In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and

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[1347] *Id.* ¶¶ 180-186.

[1348] Resp's C-M ¶ 568.

[1349] *See id.*¶ 575.

[1350] *Id.* ¶¶ 577-584.

[1351] *Id.*¶ 569.

[1352] *Id.*¶ 570.

[1353] Jeremy K. Sharpe and Lee Caplan, *United States*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 791 (Chester Brown ed., 2013) (CL-0377) (emphasis added); *see also* Rachel D. Edsall, *Indirect Expropriation Under NAFTA and DRCAFTA: Potential Inconsistencies in the Treatment of State Public Welfare Regulations*, 86 BOSTON UNIV. LAW REVIEW 931, 958 (2006) (CL-0376) (stating that "[g]iven the vague nature of the term 'rare circumstances,' it could be a comparatively broad exception to the presumption in favor of 'nondiscriminatory regulatory actions.'").

[1354] US NDP Submission ¶ 46.

> compensable in international law. It thus inevitably falls to the *adjudicator* to determine whether particular conduct by a state 'crosses the line' that separates valid regulatory activity from expropriation. Faced with the question of *when, how and at what point an otherwise valid regulation becomes, in fact and effect, an unlawful expropriation*, international tribunals must consider the circumstances in which the question arises.[1355]

Other tribunals concur, and certainly do not deem entire categories of measures as non-expropriatory.[1356] In fact, in *Bear Creek v. Peru*, the tribunal considered that, in light of the detailed provisions of the Canada-Peru FTA regarding expropriation (akin to DR-CAFTA Annex 10-C.4(b)),[1357] no other exception from general international law, such as the police powers doctrine, is applicable.[1358]

453. Even if the police power doctrine did apply, however, Respondent's reliance on the *Philip Morris* case does not assist it.[1359] That tribunal held that there was no expropriation "because the effects of the [challenged ordinances] were far from depriving [the investment] of the value of its business or even causing a 'substantial deprivation' of the value, use or enjoyment of the Claimants'

[1355] *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award dated 17 Mar. 2006 ¶¶ 258, 263-264 (CL-0154) (emphases in original).

[1356] *See, e.g.*, *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award dated 17 Feb. 2000 ¶ 72 (CL-0134) ("Expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains."); *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003 ¶ 121 (CL-0122) ("After reading Article 5(1) of the Agreement and interpreting its terms according to the ordinary meaning to be given to them (Article 31(1) of the Vienna Convention), we find no principle stating that regulatory administrative actions are *per se* excluded from the scope of the Agreement, even if they are beneficial to society as a whole —such as environmental protection—, particularly if the negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or economic or commercial use of its investment without receiving any compensation whatsoever."); *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award dated 2 Oct. 2006 ¶ 423 (CL-0162) ("It is the Tribunal's understanding of the basic international law principles that while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. As rightly pointed out by the Claimants,the rule of law, which includes treaty obligations, provides such boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment-protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate.").

[1357] *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award dated 30 Nov. 2017 ¶ 336 (CL-0139) (quoting Canada-Peru FTA, Annex 812.1(c), "Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.").

[1358] *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award dated 30 Nov. 2017 ¶¶ 471-474 (CL-0139) ("Also in substance, in view of the very detailed provisions of the FTA regarding expropriation (Article 812 and Annex 812.1) and regarding exceptions in Article 2201 expressly designated to "Chapter Eight (Investment)", the interpretation of the FTA must lead to the conclusion that no other exceptions from general international law or otherwise can be considered applicable in this case.").

[1359] Resp's C-M ¶¶ 571-572.

investments,"[1360] and only relied on the police powers doctrine as an "additional reason in support of the same conclusion."[1361] Regardless, the character of that measure – a plain packaging requirement and a regulation increasing the size of health warnings for cigarettes packs to support public health – bears no resemblance to those at issue here.

454. *Finally*, Respondent's attempts to slot its conduct within the parameters of Annex 10-C.4(b) by reference to the legitimacy of the public welfare objective behind the ILO Convention 169 consultation requirement[1362] are unavailing. Guatemala argues that the decision of the Constitutional Court to suspend the Progreso VII license was to further the same purpose of facilitating consultations on the basis that there were "serious conflicts hounding the mining project."[1363] Claimants, however, have already highlighted the contrary position espoused by Guatemala vis-à-vis the ILO Convention 169 consultation requirements before other international *fora* such as the IAHCR.[1364] Furthermore, that Guatemala has not taken any steps towards carrying out these consultations, confirms that its measures were not taken to advance legitimate public welfare objectives. Nor can Guatemala avoid the fact that *none* of the challenged measures were measures of general application, all were discriminatory, and they were taken without due process – all hallmarks that render the character of the measures expropriatory in nature.

6. Guatemala's Unlawful Expropriation Rendered Claimants' Shareholding In Exmingua Worthless

455. In their Memorial, Claimants demonstrated how Respondent unlawfully expropriated their investments by "rendering their shareholding in Exmingua worthless."[1365] Yet, in its Counter-Memorial, Respondent complains that Claimants "pleaded no facts that show, if at all, that there was a diminution in the value of their shares" and that this is further confirmed by claims for damages "centered on lost cash flow from the operating mine."[1366] Respondent argues that Claimants did not "establish any chain of events" showing that the interference with Exmingua's activities resulted in

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[1360] *Philip Morris Brands SÀRL* et al. *v. Oriental Republic of Uruguay,* ICSID Case No. ARB/10/7, Award dated 8 July 2016 ¶ 284 (RL-0124).

[1361] *Id.*¶ 287.

[1362] Resp's C-M ¶¶ 575-583.

[1363] *Id.*¶¶ 582-583.

[1364] *See supra* § II.B.2.

[1365] Clms' Mem. ¶ 144; *see also id*. ¶ 164 ("Guatemala's acts and omissions, taken by the MEM, the President, the national police, and the courts, have had the effect of depriving Claimants of all or substantially all of the *value of their investment*, and, therefore, constitute an indirect expropriation.") (emphasis added); *id*. ¶ 172 ("[T]he effect of Guatemala's measures has been to deprive Claimants of *all of the value of their investments in Exmingua*") (emphasis added).

[1366] Resp's C-M ¶ 475.

interference with their shares.[1367] Respondent also argues with reference to *GAMI v. Mexico* that Claimants have not established by "objective evidence" that there has been a dimunition in the value of their shares in Exmingua.[1368] These arguments are yet another reprise of Guatemala's failed preliminary objection regarding so-called reflective loss.

456. *First*, it is axiomatic that if a claimant alleges the expropriation of its wholly-owned investment – and if that expropriation is demonstrated – then that claimant has shown a substantial deprivation. In such circumstance, the claimant need not show a diminution in the value of its shares in the investment, as its claim is not one for reflective loss; it is a direct claim, because *only* the shareholder (and not the investment itself) suffers a loss when a wholly-owned investment is expropriated. The United States, which supports Guatemala's mistaken view on the admissibility of reflective loss claims, concurs,[1369] as did Arbitrator Douglas in his partially dissenting opinion to the Tribunal's Decision on Preliminary Objections.[1370]

457. *Second*, Claimants nevertheless did show that, as a result of Respondent's expropriatory measures, the value of their shares in Exmingua were rendered worthless.[1371] There is no way for Claimants, who wholly own Exmingua, to show the dimunition in the value of their shareholding other than by reference to Respondent's actions against Exmingua that destroyed Exmingua's value. In expropriation claims made by shareholders, tribunals thus have evaluated such claims with reference to precisely the kind of evidence that Claimants have adduced.[1372]

458. In *Olympic Entertainment Group v. Ukraine*, for instance, the tribunal found that a law banning gambling was expropriatory, because the licensing rights of Olympic, the local Ukrainian subsidiary of the claimant, "were immediately extinguished" by it.[1373] The tribunal explained that "[t]he licences were the linchpin of the [c]laimant's business: with no licence, there could be no operations. And with no operations, there could be no ability to generate cash flows. The direct

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[1367] *Id.*¶ 475.

[1368] *Id.*¶¶ 480-482.

[1369] US NDP Submission ¶ 55.

[1370] Partial Dissenting Opinion of Prof. Zachary Douglas QC dated 13 Mar. 2020 ¶ 28.

[1371] Clms' Mem. ¶¶ 165-166.

[1372] *Olympic Entertainment Group AS v. Ukraine*, PCA Case No. 2019-18, Award dated 15 Apr. 2021, ¶ 107 (CL-0327); *see also, e.g.*, *Mohamed Abdel Raouf Bahgat v. The Arab Republic of Egypt*, PCA Case No. 2012-07, Final Award dated 23 Dec. 2019, ¶ 227 (CL-0343) (finding an indirect expropriation after determining that the measures had "*de facto* brought an end to all commercial activities of ADEMCO and AISCO [the claimant's local subsidiaries]."); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award dated 13 Sept. 2001 ¶ 8 (CL-0052) (finding an expropriation on the basis that the "Media Council's actions and omissions … caused the destruction of [the claimant's local subsidiary's] ČNTS' operations, leaving ČNTS as a company with assets, but without business.").

[1373] *Olympic Entertainment Group AS v. Ukraine*, PCA Case No. 2019-18, Award dated 15 Apr. 2021, ¶ 99 (CL-0327).

taking of the licences thus amounted to an indirect taking of the [c]laimant's investments in Ukraine."[1374] This is exactly the kind of showing that Claimants have made regarding the impact of the indefinite suspension of Exmingua's licenses upon its operations and its ability to generate cash flows[1375] – and are the relevant facts necessary to establish an indirect expropriation of Claimants' investments in Exmingua.

459. *Finally*, the *GAMI v. Mexico* case is of no assistance to Guatemala. In *GAMI*, the claimant held a minority interest of approximately 14% in a local company, GAM, which, in turn, owned sugar mills that were the subject of an expropriation decree.[1376] The claimant's expropriation claim failed, because GAM successfully challenged the expropriation of three of the mills – which were then to be returned to GAM[1377] –and the "Mexican Government has assured the Tribunal that it will give such compensation as required by Mexican law with respect to GAM's two other expropriated mills."[1378] Those facts are not the "same relevant facts"[1379] before the Tribunal, and the *GAMI* tribunal's pronounced standard that there must exist "*objective findings justified by evidence* that [the investment's] value as an enterprise had been destroyed or impaired"[1380]- is met in this case, as Claimants have demonstrated that Respondent's measures have rendered Exmingua valueless.[1381]

C. Guatemala Failed To Accord Claimants' Investments Fair And Equitable Treatment

460. In their Memorial, Claimants established that DR-CAFTA Article 10.5 obligates Guatemala to provide Claimants' investments the customary international law ("CIL") minimum standard of treatment ("MST"), including fair and equitable treatment ("FET"), and that Guatemala breached this treaty obligation in a variety of ways.[1382]

[1374] *Id.* ¶ 107; *see also, e.g.*, *Mohamed Abdel Raouf Bahgat v. The Arab Republic of Egypt*, PCA Case No. 2012-07, Final Award dated 23 Dec. 2019, ¶ 227 (CL-0343) (finding an indirect expropriation after determining that the measures had "*de facto* brought an end to all commercial activities of ADEMCO and AISCO [the claimant's local subsidiaries]."); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award dated 13 Sept. 2001 ¶ 591 (CL-0052) (finding an expropriation on the basis that the "Media Council's actions and omissions … caused the destruction of [the claimant's local subsidiary's] ČNTS' operations, leaving ČNTS as a company with assets, but without business.").

[1375] *See* Clms' Mem. ¶¶ 167-168, 362-365; *infra* § IV.C; Versant I ¶ 79.

[1376] *GAMI Investments, Inc. v. United Mexican States*, NAFTA, UNCITRAL, Final Award dated 15 Nov. 2004 ¶ 13 (CL-0036).

[1377] *Id.* ¶ 8.

[1378] *Id.*¶ 35.

[1379] Resp's C-M ¶ 482.

[1380] *GAMI Investments, Inc. v. United Mexican States*, NAFTA, UNCITRAL, Final Award dated 15 Nov. 2004 ¶ 132 (CL-0036) (emphasis in the original).

[1381] Clms' Mem § III.A.2.a.

[1382] Clms' Mem. ¶¶ 201-249.

461. In its Counter-Memorial, Guatemala questions the content of the FET standard, and argues that Claimants have failed to establish any breach.[1383] Despite the admonition of the Tribunal President at the First Session that, "[w]ith three very experienced tribunal members and very experienced counsel on both sides, sometimes concision can be accomplished without the need to write a long treatise on each legal standard,"[1384] Guatemala engages in a treatise-like discussion of its views of the MST obligation.[1385] Below, Claimants respond only to Guatemala's assertions regarding the standard that are relevant for deciding this dispute, and demonstrate that Guatemala misunderstands the law and misapplies it to the facts at hand.

1. The Treaty Prohibits Unfair And Inequitable Treatment Of Investments

462. In their Memorial, Claimants established that the CIL MST obligation has evolved over time, as set forth by the *Waste Management v. Mexico II* tribunal in a holding that has been endorsed and followed by numerous DR-CAFTA, NAFTA, and other tribunals and States.[1386] In sum, the standard requires (among other things) a State to act in good faith, refrain from acting arbitrarily, provide a stable and secure legal business environment, and respect an investor's legitimate expectations.[1387] Claimants also showed that numerous tribunals have held the host State liable where, as here, the State acted arbitrarily, unfairly, and in complete disregard of its legal framework.[1388]

463. In its Counter-Memorial, Guatemala argues that the DR-CAFTA's FET standard is only breached if a State acts in an egregious or manifestly arbitrary manner.[1389] Guatemala then asserts that Claimants failed to discharge their burden to prove that the aspects of FET they rely on form part of the MST.[1390] Specifically, Guatemala claims that the MST does not prohibit "mere" arbitrary conduct, the obligation to act in good faith, or the duty to provide a stable and secure legal business environment, and does not protect an investor's legitimate expectations.[1391] Guatemala's position regarding the content of Article 10.5's FET standard is wrong, as demonstrated below.

[1383] Resp's C-M ¶¶ 266-400.

[1384] First Session, Audio Rec., at 53:07.

[1385] Resp's C-M ¶¶ 266-400.

[1386] Clms' Mem. ¶¶ 203-208.

[1387] *Id.* ¶ 209; *Waste Management Inc. v. United Mexican States (II)*, NAFTA, ICSID Case No. ARB/AF/00/03, Award dated 30 Apr. 2004 ¶ 98 (CL-0022).

[1388] Clms' Mem. ¶¶ 210-220.

[1389] Resp's C-M ¶¶ 266-282.

[1390] *Id.* ¶¶ 305-310.

[1391] *Id.* ¶¶ 312-336.

464. *First*, Guatemala's assertion that the DR-CAFTA's FET standard requires an egregious or a manifestly arbitrary act is incorrect.[1392] Specifically, Guatemala argues that FET should not be interpreted as an autonomous standard and, to purportedly support that conclusion, describes in painstaking detail the NAFTA's negotiating history and developments leading to the Free Trade Commission's ("FTC") 2001 Note of Interpretation, as well as the 2004 U.S. Model BIT.[1393] Guatemala admonishes the Tribunal to "give due attention to the United States' as well as NAFTA State parties' interpretation of customary international minimum standard of treatment."[1394] Guatemala then relies on the *Neer v. Mexico* decision to argue that Article 10.5's FET standard "only shields investors from serious misconducts [*sic*]" and the threshold for its violation is high, requiring gross denial of justice, manifest arbitrariness, blatant unfairness, evident discrimination or a complete lack of due process.[1395] Guatemala asserts that "State parties to the CAFTA and NAFTA have consistently stressed that a mere arbitrary act cannot violate the minimum standard of treatment."[1396]

465. In so arguing, Guatemala trots the same path as other respondent-States in DR-CAFTA and NAFTA cases, whereby it seeks to exonerate itself from obligations it assumed towards protected investments by interposing an unduly restrictive application of the CIL FET obligation. Tribunals have consistently and properly rejected that approach.[1397]

466. While Guatemala elaborates in detail on the NAFTA's negotiating history, the FTC 2001 Note of Interpretation and the 2004 U.S. Model BIT, it does not elucidate what precise conclusion it wishes the Tribunal to draw from that lecture, beyond giving "due attention to the United States' as well as NAFTA State parties' interpretation…."[1398] This does not assist Guatemala, because this Tribunal is seized with applying the *DR-CAFTA* and, pursuant to VCLT principles of interpretation, it is only the common and concordant subsequent agreement or practice of the *DR-CAFTA* Parties that shall be taken into account, and *not* the views of only some of them or of the NAFTA State Parties.[1399]

[1392] *Id.* ¶¶ 266-282.

[1393] *Id.* ¶¶ 267-275.

[1394] *Id.* ¶ 275.

[1395] *Id.* ¶¶ 276-279.

[1396] *Id.* ¶ 280.

[1397] *See*, *e.g.*, *Windstream Energy LLC v. The Gov't of Canada*, NAFTA, PCA Case No. 2013-22, Award dated 27 Sept. 2016 ¶ 352 (CL-0210); *Mondev Int'l Ltd. v. United States of America*, NAFTA, ICSID Case No. ARB(AF)/99/2, Award dated 11 Oct. 2002 ¶¶ 115-117 (RL-0018); *Cargill, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/05/2, NAFTA, Award dated 18 Sept. 2009 ¶ 282 (CL-0197); *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, NAFTA, Award dated 8 June 2009 ¶ 616 (RL-0041); *Int'l Thunderbird Gaming Corp. v. The United Mexican States*, NAFTA, Arbitral Award, 26 Jan. 2006 ¶ 194 (CL-0198).

[1398] Resp's C-M ¶¶ 267-275.

[1399] *See* Vienna Convention on the Law of Treaties, done on 23 May 1969, Art. 31(3) (CL-0005).

467. Guatemala's reliance on the *Neer v. Mexico* decision[1400] is also unavailing. At the outset, *Neer* is inapposite, because, as several tribunals have acknowledged, the case did not deal with the treatment of foreign investments, but rather addressed the State's obligation to ensure the physical protection of aliens from crimes.[1401] In any event, the *Neer* decision merely held that there was a high threshold for finding a violation of the MST.[1402] What has changed in the past 100 years since the *Neer* decision, however, is the *content* of the standard and the types of State conduct that violate it. Guatemala entirely ignores that it is well established that the CIL MST has evolved over time, as noted by multiple tribunals,[1403] including under the DR-CAFTA.[1404]

468. Guatemala's selective quotations to cases in an attempt to support its contrary view is misinformed. In particular, Guatemala cites to *Glamis Gold v. United States* to argue that the standard "remains as stringent as it was under *Neer*," but fails to quote the remainder of that very sentence, which goes on to say that "it is entirely possible that, as an international community, we may be shocked by State actions now that did not offend us previously."[1405] The *Thunderbird v. Mexico* decision, also cited approvingly by Guatemala for "[r]elying on the fundamentals of the *Neer*

[1400] Resp's C-M ¶¶ 276-279.

[1401] *See, e.g.*, *Windstream Energy LLC v. The Gov't of Canada*, PCA Case No. 2013-22, Award dated 27 Sept. 2016 ¶ 352 (CL-0210); *Mondev Int'l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award dated 11 Oct. 2002 ¶ 115 (RL-0018); *Cargill, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/05/2, Award dated 18 Sept. 2009 ¶ 282 (CL-0197).

[1402] *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, Decision dated 15 Oct. 1926, at 61-62 (RL-0183).

[1403] Clms' Mem. ¶ 203; *Mondev Int'l Ltd. v. United States of America*, NAFTA, ICSID Case No. ARB(AF)/99/2, Final Award dated 11 Oct. 2002 ¶ 116 (RL-0018) ("[W]hat is unfair or inequitable need not equate with the outrageous or the egregious"); *ADF Group Inc. v. United States of America*, NAFTA, ICSID Case No. ARB(AF)/00/1, Award dated 9 Jan. 2003 ¶ 179 (CL-0081) ("[W]hat customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case was rendered"); *William Ralph Clayton* et al. *v. Gov't of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 Mar. 2015 ¶ 438 (CL-0088) ("At the same time, the international minimum standard exists and has evolved in the direction of increased investor protection precisely because sovereign states—the same ones constrained by the standard—have chosen to accept it."); *Id.* ¶ 433 ("NAFTA awards make it clear that the international minimum standard is not limited to conduct by host states that is outrageous. The contemporary minimum international standard involves a more significant measure of protection."); *Chemtura Corp. v. Government of Canada*, NAFTA/ UNCITRAL, Award dated 2 Aug. 2010 ¶ 121 (CL-0087) (observing that it could not "overlook the evolution of customary international law, nor the impact of BITs on this evolution"); *Merrill & Ring Forestry L. P. v. Gov't of Canada*, ICSID Case No. UNCT/07/1, Award dated 31 Mar. 2010 ¶ 193 (CL-0201) (noting "a shared view that customary international law has not been frozen in time and that it continues to evolve in accordance with the realities of the international community"); *Int'l Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Arbitral Award dated 26 Jan. 2006 ¶ 194 (C-0198) ("The content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law."); *Pope & Talbot v. Canada*, Award in Respect of Damages dated 31 May 2002 ¶¶ 57-58 (CL-0028) ("Canada considers that the principles of customary international law were frozen in amber at the time of the *Neer* decision. . . . The Tribunal rejects this static conception of customary international law").

[1404] *Railroad Development Corp. v. Republic of Guatemala*, DR-CAFTA, ICSID Case No. ARB/07/23, Award dated 29 June 2012 ¶ 218 (CL-0068) ("[T]he minimum standard of treatment is 'constantly in a process of development,' including since *Neer*'s formulation").

[1405] Resp's C-M ¶ 277 (quoting from *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award dated 8 June 2009 ¶ 616 (RL-0041)); *see also Id.* ¶ 278.

standard," states expressly that "the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law," which Guatemala also ignores.[1406]

469. Further, Guatemala's assertion that "State parties to the CAFTA and NAFTA have consistently stressed that a mere arbitrary act cannot violate the minimum standard of treatment"[1407] is unavailing. In support, Guatemala cites to State Parties' interventions in various NAFTA and DR-CAFTA cases and claims that these are "instructive" and "shed[] light into the actual meaning" of Article 10.5 of the Treaty under Article 31(3)(a) of the VCLT, which Guatemala incorrectly restates as referring to "subsequent practice in the application of the treaty."[1408] These examples, however, neither pertain to the same treaty nor represent the views of *all* DR-CAFTA Parties.[1409] Specifically, Guatemala cites to the United States' position presented in a NAFTA case, and the position of Honduras, Costa Rica, and El Salvador in DR-CAFTA cases.[1410] However, Guatemala is silent on the position, if any, of Nicaragua and the Dominican Republic, and, furthermore, ignores that the United States' NDP submission in this case does not support its assertion. Guatemala accordingly has failed to establish that there is a subsequent agreement or practice of the DR-CAFTA State Parties supporting its interpretation that Article 10.5 does not prohibit "mere" arbitrary acts.[1411]

470. *Second*, Guatemala asserts that Claimants failed to prove that the standards they rely on form part of the MST, and that "[n]either state practice nor jurisprudence… consider the obligation[s] alleged by Claimants to be part of the customary international minimum standard of treatment."[1412]

[1406] *See* Resp's C-M ¶ 277 (quoting from *Int'l Thunderbird Gaming Corp. v. The United Mexican States*, Arbitral Award, 26 Jan. 2006 ¶ 194 (CL-0198)); *see also Cargill, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/05/2, Award dated 18 Sept. 2009 ¶ 282 (CL-0197) (noting that "this Tribunal agrees with the view that the [CIL MST] may evolve in accordance with changing State practice manifesting to some degree expectations within the international community. As the world and, in particular, the international business community become ever more intertwined and interdependent with global trade, foreign investment, BITs and free trade agreements, the idea of what is the minimum treatment a country must afford to aliens is arising in new situations simply not present at the time of the *Neer* award which dealt with the alleged failure to properly investigate the murder of a foreigner."); Resp's C-M ¶ 277, n. 447 (citing to *Eli Lilly and Co. v. Canada,* ICSID Case No. UNCT/14/2, Final Award dated 16 Mar. 2017 ¶ 222 (RL-0040), which does not refer to *Neer* at all and instead cites approvingly to *Glamis Gold* for the proposition that the conduct must be "*sufficiently* egregious and shocking" (emphasis added)).

[1407] Resp's C-M ¶¶ 280-282.

[1408] *Id.* ¶ 281 (citing to VCLT, Art. 31(3)(a) (CL-0005)).

[1409] *See* Decision on Respondent's Prelim. Objections dated 13 Mar. 2020 ¶ 156 (noting that "the predicate requirement is an agreement or practice by all of the parties to a particular treaty, not some subset of the treaty parties").

[1410] *See* Resp's C-M ¶ 281; *see also Id.* ¶ 280 (citing to *Glamis Gold, Ltd. v. The United States of America*, NAFTA, UNCITRAL, United States' Resp's C-M dated 19 Aug. 2006, at 227-228 (RL-0181)). While Guatemala also cites to *Berkowitz v. Costa Rica*, Submission of the United States dated 17 Apr. 2015 ¶ 12 (RL-0043), that submission does not refer to the level of arbitrariness necessary to breach the minimum standard of treatment, but merely includes a *passim* reference to the United States' submissions, including in *Glamis Gold*).

[1411] United States' NDP Sub. ¶¶ 9-22 (not discussing arbitrariness).

[1412] Resp's C-M ¶ 310; *see also Id.* ¶¶ 305-309.

Specifically, Guatemala claims that CIL does not encompass the prohibition of "mere" arbitrary conduct, the obligation to act in good faith, the protection of an investor's legitimate expectations, or the duty to provide a stable and secure legal business environment.[1413] Guatemala is incorrect.

471. Claimants have detailed substantial and consistent practice leading to and subsequently overwhelmingly supporting the content of the standard encompassing the FET aspects they invoke.[1414] In particular, Claimants relied on the *Waste Management v. Mexico II* decision, holding that the CIL MST is breached by conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic, [] discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety" and that "[i]n applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."[1415] This explication of the FET standard has been endorsed by numerous DR-CAFTA, NAFTA, and other tribunals, as well as by several State Parties, *including Guatemala*.[1416]

472. Although Guatemala questions whether "Article 10.5 includes an obligation to refrain from [ ] mere arbitrary conduct,"[1417] it approves of the *Waste Management II* tribunal's interpretation of the MST obligation, which expressly refers to "arbitrary" conduct, without any qualifiers and, moreover, quizzically considers the case to allegedly support its position regarding a more heightened standard.[1418] Equally, Guatemala ignores that the *Merrill & Ring v. Canada* NAFTA tribunal found the prohibition of arbitrariness to be "to a large extent the expression of general principles of law and hence also a part of international law," and that "no tribunal today could be asked to ignore these basic obligations of international law."[1419] Guatemala also fails to note the *Glamis Gold* tribunal's conclusion that "arbitrariness that contravenes the rule of law, rather than a rule of law, would occasion surprise not only from investors, but also from tribunals."[1420] Further, the *Clayton v. Canada* tribunal observed that the "*Waste Management* test mentions arbitrariness," and it accordingly found

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[1413] Resp's C-M ¶¶ 312-336.

[1414] Clms' Mem. ¶¶ 203-220.

[1415] *Id.* ¶ 204.

[1416] Clms' Mem. ¶¶ 205-208; *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award dated 29 June 2012 ¶ 219 (CL-0068); *TECO Guatemala Hldgs., LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award dated 19 Dec. 2013 ¶¶ 454-456 (CL-0031); *Merrill & Ring Forestry L. P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award dated 31 Mar. 2010 ¶¶ 187, 207-211, 213 (CL-0201); *BG Group v. Argentina*, Final Award dated 24 December 2007 ¶¶ 294, 296, 298, 301 (CL-0050).

[1417] Resp's C-M ¶¶ 321-325.

[1418] *Id.* ¶ 324.

[1419] Clms' Mem. ¶ 206; *Merrill & Ring Forestry L. P. v. Government of Canada*, NAFTA, ICSID Case No. UNCT/07/1, Award dated 31 Mar. 2010 ¶ 187 (CL-0201).

[1420] *Glamis Gold, Ltd. v. United States of America,* NAFTA/ UNCITRAL, Award dated 8 June 2009 ¶ 625 (RL-0041) (emphasis omitted).

"that the conduct of the joint review was arbitrary," and thus in violation of the NAFTA's MST obligation.[1421]

473. Guatemala also asserts that the MST does not require good faith.[1422] Claimants, however, have already established the contrary.[1423] In particular, Guatemala entirely ignores that the *TECO v. Guatemala* tribunal emphasized that:

> [T]he minimum standard is part and parcel of the international principle of good faith. There is no doubt in the eyes of the Arbitral Tribunal that the *principle of good faith is part of customary international law* as established by Article 38.1(b) of the Statute of the International Court of Justice, and that a *lack of good faith on the part of the State or of one of its organs should be taken into account in order to assess whether the minimum standard was breached*.[1424]

Equally, Guatemala does not engage with Claimants' reliance on the *Waste Management II* decision – elsewhere quoted by Guatemala with approval – which held that "[a] basic obligation of the State under [FET] is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means."[1425]

474. Further, Guatemala asserts that the MST does not encompass the duty to provide a stable and secure legal business environment,[1426] that national legislation does not give raise to reasonable expectations, and that an investor is not protected against changes of legislation or interpretation of the law, including by courts.[1427] Guatemala also contends that an investor must conduct necessary due diligence, both in the overall regulatory framework and in "all circumstances, including … the political, socioeconomic, cultural, and historical conditions prevailing in the host State."[1428] In this regard, Guatemala misconstrues the law.

[1421] *William Ralph Clayton* et al*. v. Gov't of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 Mar. 2015 ¶ 591 (CL-0088).

[1422] Resp's C-M ¶¶ 326-330.

[1423] Clms' Mem. ¶¶ 204-209, 214, 217-218.

[1424] *TECO Guatemala Hldgs., LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award dated 19 Dec. 2013 ¶ 456 (CL-0031) (emphasis added).

[1425] *Waste Management Inc. v. United Mexican States (II)*, NAFTA, ICSID Case No. ARB/AF/00/03, Award dated 30 Apr. 2004 ¶ 138 (CL-0022); Clms' Mem. ¶ 204; *see also Merrill & Ring Forestry L. P. v. Gov't of Canada*, ICSID Case No. UNCT/07/1, Award dated 31 Mar. 2010 ¶ 187 (CL-0201) ("Good faith and the prohibition of arbitrariness are no doubt an expression of such general principles and no tribunal today could be asked to ignore these basic obligations of international law."). Guatemala's dismissal of the case on the ground that the tribunal interpreted good faith as a "stand alone" obligation (Resp's C-M ¶¶ 327-328) is unavailing, as Claimants have shown that good faith is a CIL obligation.

[1426] Resp's C-M ¶¶ 331-336.

[1427] *Id.* ¶¶ 370-377.

[1428] *Id.* ¶¶ 380-383.

475. While CIL does not require a State to freeze its laws in place – and Claimants have never suggested otherwise – as the *Merrill & Ring* tribunal held, "[t]he availability of a secure legal environment has a close connection too to such [general] principles" of law, such as good faith and the prohibition of arbitrariness.[1429] Moreover, while Guatemala contends that the *Tecmed* tribunal did not "rule that an investor has a right to a 'stable and secure legal environment,'" but instead "merely concluded that a foreign investor expects that a state would not act arbitrarily,"[1430] Guatemala omits the subsequent sentence in the *Tecmed* award stating that "[t]he investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation."[1431] Indeed, interpreting the Treaty's FET provision to include the protection of a stable and secure legal business environment is supported by the Treaty's Preamble, which needs to be taken into account as context.[1432] This also accords with the objective and purpose of the Treaty, which includes "[ensuring] a predictable commercial framework for business planning and investment."[1433]

476. Finally, although Guatemala opposes consideration of an investor's legitimate expectations,[1434] this has been accepted as a component of FET by NAFTA and DR-CAFTA Parties and tribunals – despite NDP submissions to the contrary. For example, in *Railroad v. Guatemala*, the tribunal found that "the manner in which and the grounds on which [Guatemala] applied the *lesivo*" breached Article 10.5 "by being, in the words of *Waste Management II*, 'arbitrary, grossly unfair, and unjust.' … , including by evidencing that *lesivo* was *in breach of representations made by Guatemala upon which Claimant reasonably relied*".[1435] In *Clayton v. Canada*, the NAFTA tribunal found that "[t]he *legitimate expectations* of an investor— [is] a factor that *may be part of an overall analysis of*

[1429] *Merrill & Ring Forestry L. P. v. Gov't of Canada*, NAFTA, ICSID Case No. UNCT/07/1, Award dated 31 Mar. 2010 ¶ 187 (CL-0201).

[1430] Resp's C-M ¶ 334, n. 544 (quoting *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award dated 29 May 2003 ¶ 154 (CL-0122)).

[1431] *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award dated 29 May 2003 ¶ 154 (CL-0122).

[1432] VCLT, Art. 31(2) (CL-0005) ("The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes . . . .").

[1433] DR-CAFTA, Preamble (CL-0001); *see also* NAFTA, Preamble (CL-0034) (same).

[1434] Resp's C-M ¶¶ 312-320, 370-377, 380-383.

[1435] *Railroad Development Corp. (RDC) v. Republic of Guatemala*, DR-CAFTA, ICSID Case No. ARB/07/23, Award dated 29 June 2012 ¶ 235 (CL-0068) (emphasis added).

whether treatment has breached the minimum standard of fairness …."[1436] Multiple other cases hold similarly.[1437]

477. Instead of engaging with these DR-CAFTA and NAFTA cases, Guatemala criticizes Claimants for relying on some cases which Guatemala asserts interpret an FET autonomous standard, not bound by CIL.[1438] However, having established the *content* of Article 10.5's FET *legal standard*,[1439] Claimants properly relied on these cases to illustrate *fact-specific patterns* where tribunals that have found breaches of FET obligations in circumstances analogous to this case, including (among others) where a State arbitrarily denied permission for a previously-authorized project.[1440]

478. While Guatemala's asserts that the *Glamis Gold* tribunal "dismissed a similar approach of [relying on non-NAFTA/ DR-CAFTA decisions for] demonstrating that legitimate expectations are protected by a minimum standard of treatment",[1441] Guatemala fails to note that the *Glamis Gold* tribunal found that "Article 1105(1) requires the evaluation of whether the State made any specific assurance or commitment to the investor so as to induce its expectations. . . . In this way, a State may be tied to the objective expectations that it creates in order to induce investment."[1442]

479. Guatemala's further contention that "[f]our out of seven of the CAFTA member states have held that the [FET obligation] under the minimum standard of treatment does not include an

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[1436] *William Ralph Clayton* et al*., v. Gov't of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 Mar. 2015 ¶ 282 (CL-0088) (emphasis added); *Id.* ¶¶ 589-604 (finding that the claimants had reasonable expectations that were breached).

[1437] *Int'l Thunderbird Gaming Corp. v. The United Mexican States*, NAFTA, Arbitral Award dated 26 Jan. 2006 ¶ 147 (CL-0198) ("Having considered recent investment case law and the good faith principle of international customary law, the concept of 'legitimate expectations' relates, within the context of the Nafta framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the Nafta Party to honour those expectations could cause the investor (or investment) to suffer damages." (footnote omitted)); *Waste Management Inc. v. United Mexican States (II)*, NAFTA, ICSID Case No. ARB/AF/00/03, Award dated 30 Apr. 2004 ¶ 98 (CL-0022) ("In applying this [MST] standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."); *Glamis Gold, Ltd. v. The United States of America*, NAFTA, UNCITRAL, Award dated 8 June 2009 ¶¶ 620-621 (RL-0041) (agreeing "with *International Thunderbird* that legitimate expectations relate to an examination under Article 1105(1) in such situations 'where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct . . . .' In this way, a State may be tied to the objective expectations that it creates *in order to induce* investment." (footnotes omitted)); *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, NAFTA, UNCITRAL Award dated 12 Jan. 2011 ¶ 141 (RL-0155) ("Ordinarily, reasonable or legitimate expectations of the kind protected by NAFTA are those that arise through targeted representations or assurances made explicitly or implicitly by a state party.").

[1438] Resp's C-M ¶¶ 317-320 (referring to *Tecmed v. Mexico*, *MTD v. Chile*, *Arif v. Moldova* and *Walter Bau v. Thailand*).

[1439] Clms' Mem. ¶¶ 202-209.

[1440] *Id.* ¶¶ 210-220.

[1441] Resp's C-M ¶ 320.

[1442] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award dated 8 June 2009 ¶¶ 620-621 (RL-0041).

obligation to protect [legitimate expectations]"[1443] also does not assist it. Guatemala acknowledges that there is *no* subsequent agreement or practice of the DR-CAFTA State Parties in this regard. Further, in neither of the two DR-CAFTA cases that Guatemala submits that these select four State Parties criticized the protection of legitimate expectations, did the tribunals agree to exclude this aspect from the DR-CAFTA's FET content. To the contrary, the *RDC* tribunal, as noted, found that legitimate expectations of investors are relevant, while the *TECO v. Guatemala* tribunal found that it did not need to decide the question, having focused on a different aspect of the FET standard.[1444]

480. And while Guatemala states that "[a]ll three NAFTA member states are of the same opinion",[1445] this is both irrelevant (as only one State is Party to both treaties) and unsupported (because Guatemala refers to the positions of only two of the three NAFTA Parties).[1446] Further undermining Guatemala's contention, the United States' NDP in *Mesa v. Canada*, on which Guatemala relies, merely notes that an investor's expectations will be shaped by "the state of regulation in a particular sector", and does not opine on whether the MST protects *any* legitimate expectations.[1447]

481. Guatemala also criticizes Claimants' reliance on the principle of estoppel, arguing that "Claimants fail to establish how the [CIL MST] includes such obligation."[1448] In doing so, Guatemala entirely ignores Claimants' demonstration that estoppel is a general principle of law, "[r]est[ing] on principles of good faith and consistency,"[1449] which has been affirmed by the ICJ[1450] and various ICSID tribunals.[1451] Guatemala does not engage with any of these authorities.[1452]

[1443] Resp's C-M ¶ 313, n. 513 (referring to NDP submissions by El Salvador, Honduras, and the United States and its own counter-memorial submissions in *Railroad Development v. Guatemala* and *TECO v. Guatemala* (two DR-CAFTA cases), as well as the United States' NDP submission in *Omega v. Panama*, a non-DR-CAFTA case).

[1444] *Railroad Development Corp. (RDC) v. Republic of Guatemala*, DR-CAFTA, ICSID Case No. ARB/07/23, Award dated 29 June 2012 ¶ 235 (CL-0068); *TECO Guatemala Hldgs, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 Dec. 2013 ¶¶ 617-622 (CL-0031).

[1445] Resp's C-M ¶ 313.

[1446] *Id.* n. 514 (referring to Canada's counter-memorial submission in *Windstream v. Canada* and the United States' NDP submission in *Mesa Power v. Canada*).

[1447] *Mesa Power Group LLC v. Government of Canada*, NAFTA, UNCITRAL, PCA Case No. 2012-17, Submission of the United States dated 25 July 2014 ¶ 8 (RL-0210).

[1448] Resp's C-M ¶ 335; *see* Clms' Mem. ¶ 235.

[1449] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 221 (9th ed. 2019) (CL-0212); *see also* D.W. Bowett, *Estoppel before International Tribunals and its Relation to Acquiescence*, 33 BYIL 176 (1957) (CL-0213) (noting that the basis of the rule of estoppel "is the general principle of good faith and as such finds a place in many systems of law"); ANDREW NEWCOMBE AND LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT § 10.27 (Kluwer 2009) (CL-0369) (noting that "[e]stoppel operates to preclude a party from acting inconsistently where the result of the inconsistency would be to prejudice the other party"); MALCOLM N. SHAW, INTERNATIONAL LAW 383 (8th ed. 2017) (CL-0214) (describing estoppel as prohibiting a party from changing its position after it has "made or consented to a particular statement upon which another party relies in subsequent activity to its detriment or the other's benefit" and noting

2. Guatemala Breached Its Treaty Obligation To Accord Claimants' Investments Fair And Equitable Treatment

482. Having established the content of DR-CAFTA Article 10.5, Claimants demonstrated in their Memorial that Guatemala breached its FET obligation by, among other things, suspending Exmingua's exploitation and exportation licenses;[1453] failing to conduct the Court-ordered consultations;[1454] precluding Exmingua from obtaining an exploitation license for the Santa Margarita area;[1455] and pursuing baseless criminal charges and impounding Exmingua's gold concentrate.[1456]

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that it "flow[s] to some extent from the fundamental principles of good faith and equity"); *see also* D.W. Bowett, *Estoppel before International Tribunals and its Relation to Acquiescence*, 33 BYIL 176 (1957) (CL-0213) ("The rule of estoppel . . . operates so as to preclude a party from denying before a tribunal the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit.")

[1450] *See, e.g.*, *Case Concerning the Temple of Preah Vihear* (*Cambodia v. Thailand*) [1962] ICJ Rep. 6, 32 (holding that Thailand was "precluded by her conduct from asserting that she did not accept" a boundary that Thailand had observed and benefitted from for 50 years) (CL-0215).

[1451] *See, e.g.*, *Pan American Energy LLC and BP Argentina Exploration Co. v. Argentine Republic* and *BP America Production Co. and others v. Argentine Republic*, ICSID Cases Nos. ARB/03/13 and ARB/04/8, Decision on Preliminary Objections dated 27 July 2006 ¶ 159 (CL-0366) ("Estoppel is a recognised general principle of law that has been applied by many international tribunals."); *ADC Affiliate Ltd and ADC & ADMC Mgmt Ltd v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award dated 2 Oct. 2006 ¶ 475 (CL-0272) ("Almost all systems of law prevent parties from blowing hot and cold"); *Duke Energy Int'l Peru Investments No. 1, Ltd. v. Peru*, ICSID Case No. ARB/03/28, Award dated 18 Aug. 2008 ¶ 231 (CL-0370) (observing that "estoppel or the principle of consistency – has also been universally applied as a general legal principle, both in civil and international law, to prohibit a State from taking actions or making representations which are contrary to or inconsistent with actions or representations it has taken previously to the detriment of another"); *Ioannis Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction dated 6 July 2007 ¶ 194 (CL-0163) (finding that "even if the JVA and the Concession were entered into in breach of Georgian law, the fact remains that these two agreements were 'cloaked with the mantle of Governmental authority'. Claimant had every reason to believe that these agreements were in accordance with Georgian law, not only because they were entered into by Georgian State-owned entities, but also because their content was approved by Georgian Government officials without objection as to their legality on the part of Georgia for many years thereafter."); *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award dated 6 Feb. 2008 ¶ 120 (CL-0216-ENG) (holding that estoppel "applies *a fortiori* when the alleged problem is not violation of law, but merely – as here – the failure to accomplish a formality foreseen by law, and not even required by it except as a condition of obtaining benefits unconnected with those of the BIT itself"); *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award dated 22 Aug. 2017 ¶ 628 (CL-0217) ("Pakistan has consistently maintained that Karkey's investment was established in accordance with Pakistani laws, and it is now estopped from arguing that the investment must be deemed invalid on the basis of a breach of those laws."); *see also* ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT § 10.27 (2009) (CL-0369); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 141 (Cambridge Univ. Press 2006) (1958) (CL-0218).

[1452] Guatemala instead selectively quotes *Arif v. Moldova* for the proposition that "[e]ven autonomous [FET] standard does not provide such protection [under estoppel]." Resp's C-M ¶ 335. Guatemala's reliance is misplaced. Indeed, the *Arif* tribunal found that Moldova violated its FET obligation because it "breached the legitimate expectation that Claimant could operate a duty free shop in his leased premises at Chisinau Airport, but also breached its secondary obligation to remedy or ameliorate its inability to fulfil this legitimate expectation," finding that "[t]he manner that the Airport State Enterprise washed its hands of the consequences of its own illegality is the most reprehensible element of Respondent's conduct. Independently of the legitimate expectations created and not fulfilled, this inertia in the face of the paralysis and then destruction of an investment is a breach of the fair and equitable treatment standard under the BIT." *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award dated 8 Apr. 2013 ¶ 547 (CL-0126).

[1453] Clms' Mem. ¶¶ 223-236.

[1454] *Id.* ¶ 244.

[1455] *Id.* ¶¶ 242-249.

[1456] *Id.* ¶¶ 237-241.

483. In its Counter-Memorial, Guatemala attempts to reframe Claimants' case by, among other things, trying to make this into a "legitimate expectations" case,[1457] when it is not, and inappropriately segregating the different acts of various State organs and evaluating each act against one particular aspect of the standard, rather than assessing the challenged State conduct as a whole. However, while setting out the key aspects of the FET standard, as the *Waste Management II* tribunal did, is helpful to analyze the various ways in which a State can fall short of treating investments fairly and equitably, this should not undermine the essential character of FET as a unitary standard of treatment, which requires an overall evaluation of whether a State's conduct is fair and equitable.[1458] As the NAFTA *Windstream v. Canada* tribunal explained:

> This determination is best done, not in the abstract, but in the context of the facts of this particular case, taking into account the indirect evidence of the content of the customary international law minimum standard of treatment as evidenced in the decisions of other NAFTA tribunals. … In other words, just as the proof of the pudding is in the eating (and not in its description), the ultimate test of correctness of an interpretation is not in its description in other words, but in its application on the facts.[1459]

Guatemala's conduct, in this regard, most definitely breached its obligation to accord Exmingua FET.

484. *First*, as Claimants showed, Guatemala breached its FET obligation when the MEM suspended Exmingua's validly-granted exploitation license.[1460] In response (albeit addressing the courts', rather than the MEM's, conduct), Respondent argues that Claimants had not received any specific assurance prior to making their investment that indigenous communities would not need to be consulted prior the issuance of an exploitation license,[1461] so any expectations they had to the contrary were not objective or reasonable,[1462] and, even if they were, Guatemala has not breached these expectations.[1463] These arguments are misplaced.

[1457] Resp's C-M ¶¶ 337-400.

[1458] *See*, *e.g. Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award dated 4 Apr. 2016 ¶ 545 (CL-0153); *Cairn Energy PLC and Cairn UK Hldgs Limited v. The Republic of India*, PCA Case No. 2016-07, Final Award dated 21 Dec. 2020 ¶ 1727 (CL-0335); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award dated 29 July 2008 ¶ 610 (CL-0147).

[1459] *Windstream Energy LLC v. The Government of Canada*, PCA Case No. 2013-22, Award dated 27 Sept. 2016 ¶¶ 358-362 (CL-0210).

[1460] Clms' Mem. ¶¶ 97-98, 223-236.

[1461] Resp's C-M ¶¶ 369-378.

[1462] *Id.* ¶¶ 379-396.

[1463] *Id.* ¶¶ 397-400.

485. As explained, before Exmingua's license was suspended, Guatemala *consistently* had taken the position that its international obligations under ILO Convention 169 were satisfied when the project proponent conducted consultations in connection with the social studies required for its EIA.[1464] Guatemala's courts thus had confirmed that no other legal requirements were in place in Guatemala in respect of granting a license to exploit natural resources;[1465] its courts had implored the Congress to enact legislation directly implementing ILO Convention 169 into Guatemalan law, to no avail;[1466] its courts had twice declined to find constitutional regulations that the Government proposed to govern MEM-led consultations;[1467] the MARN had consistently approved EIAs where the consultations for the social studies were led by MARN-registered consultants;[1468] the MEM consistently had issued licenses, with the Attorney General's approval, where consultations had been led by MARN-registered consultants in accordance with the Mining Regulations;[1469] and the Government had pronounced internationally that its granting of licenses pursuant to its Mining Law and Regulations satisfies its international obligations under the ILO Convention, because its domestic law provides for community consultations.[1470]

486. In the wake of this, it was no surprise that the MEM contested CALAS's *amparo* request seeking the suspension of Exmingua's exploitation license.[1471] The MEM's subsequent suspension of Exmingua's exploitation license, however, was a complete reversal of the MEM's long-held position.[1472] It was also entirely contrary to Guatemala law under which a license, once validly granted, could only be revoked or suspended in accordance with specific mechanisms, none of which were invoked or applicable here.[1473] Unsurprisingly, the MEM's resolution suspending Exmingua's exploitation license does not refer to these limited grounds – nor could it.[1474] In granting a license

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[1464] *See supra* § II.D.1.c; Clms' Mem. ¶¶ 80-81, 297; Fuentes I ¶¶ 51- 52; Fuentes II ¶¶ 54, 70, 74-77.

[1465] *See supra* § II.D.1.c; Fuentes II ¶¶ 78-80.

[1466] Fuentes II ¶¶ 58-70.

[1467] *Id.* ¶¶ 62-64.

[1468] *Id.* ¶ 74.

[1469] *Id* ¶ 74

[1470] *See supra* § II.D.1.c; Clms' Mem. ¶¶ 80-81, 297; Fuentes I ¶¶ 51-52; Fuentes II ¶¶ 54, 70, 74-77; Inter-American Commission on Human Rights Petition 1566-07, *Communities of the Sipakepense and Mam Mayan People of the Municipalities of Sipacapa and San Miguel Ixtahuacán v. Guatemala*, Admissibility Report No. 20/14 dated 3 Apr. 2014 ¶ 6 (CL-0225); Inter-American Commission on Human Rights, Petition 1118-11, *Maya Q'eqchi' Agua Caliente Community v. Guatemala*, Admissibility Report No. 30-17 dated 18 Mar. 2017 ¶ 29 (CL-0282).

[1471] *See supra* § II.D.2; Clms' Mem. ¶¶ 97, 230.

[1472] *See supra* § II.D.2; Clms' Mem. ¶¶ 98, 230.

[1473] Clms' Mem. ¶¶ 72, 88, 97, 230; Fuentes I ¶ 48.

[1474] *See* MEM Resolution No. 1202 dated 10 Mar. 2016 (C-0139).

pursuant to its authority and in accordance with law, and then suspending that license for none of the permissible reasons provided pursuant to its regulatory authority,[1475] the MEM acted arbitrarily.

487. Guatemala's actions, in placing the effects of its own purported failure to conduct ILO Convention 169 consultations on Claimants and Exmingua by suspending the exploitation license, violated its FET obligation. As stressed by the *GAMI v. Mexico* tribunal, a "government's failure to implement or abide by its own law in a manner adversely affecting a foreign investor" may lead to a violation of the FET obligation, particularly "if its officials fail to implement or implement regulations in a discriminatory or arbitrary fashion."[1476] Guatemala's attempt to discount Claimants' reliance on *GAMI* is misplaced.[1477] GAMI's FET claim failed not because the tribunal found that Mexico merely misapplied its law, as Guatemala suggests, but because GAMI was unable to show that such misapplication, pertaining to the failures in the Sugar Program, was "both directly attributable to the government and directly causative of GAMI's alleged injury."[1478] Here, by contrast, Guatemala bears sole responsibility for the MEM's suspension of Exmingua's exploitation license, as it does for Guatemala's failure to enact implementing legislation for ILO Convention 169, its change of heart regarding its approach to consultations thereunder, and its failure to conduct State-led consultations.

488. As further established by the *PSEG v. Turkey* tribunal, which found a breach of FET due to administrative negligence and inconsistency, "[s]tability cannot exist in a situation where the law kept changing continuously and endlessly, as did its interpretation and implementation" and that, as here, "it was not only the law that kept changing but notably the attitudes and policies of the administration."[1479] It is thus arbitrary and fundamentally unfair that Claimants and their investment must pay the price for Guatemala's changing interpretation and implementation of its law, as well as the changing attitudes and policies of its officials in implementing its laws.[1480]

[1475] *See supra* § II.D.2; Clms' Mem. ¶¶ 97, 230; Fuentes I ¶ 48; Fuentes II ¶ 28-31.

[1476] *GAMI Investments, Inc. v. Government of the United Mexican States*, NAFTA, UNCITRAL, Final Award dated 15 Nov. 2004 ¶¶ 91, 94 (CL-0036).

[1477] Resp's C-M ¶ 343.

[1478] *GAMI Investments, Inc. v. Government of the United Mexican States*, NAFTA, UNCITRAL, Final Award dated 15 Nov. 2004 ¶¶ 108 -110 (CL-0036).

[1479] *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award dated 19 Jan. 2007 ¶ 254 (CL-0371).

[1480] *See GAMI Investments, Inc. v. Government of the United Mexican States*, NAFTA, UNCITRAL, Final Award dated 15 Nov. 2004 ¶¶ 91, 94, 103, 108 (accepting that "an abject failure to implement a regulatory program indispensable for the viability of foreign investments that had relied upon it . . . is no different from a violation by the government of the rules of that program. Both action and inaction may fall below the international standard," and noting that "[a] claim of maladministration would likely violate Article 1105 if it amounted to an 'outright and unjustified repudiation' of the relevant regulations. There may be situations where even lesser failures would suffice to trigger Article 1105. It is the record as a

489. *Second*, as Claimants explained in their Memorial, along with suspending Exmingua's exploitation license, the MEM unlawfully suspended Exmingua's *exportation* license, and, in so doing, acted arbitrarily, unlawfully, and in bad faith, in violation of its FET obligations.[1481] In a single short paragraph in its Counter-Memorial, Guatemala asserts that the suspension was "temporary and reasonable," because it accorded with the Supreme Court's decision to suspend Exminuga's exploitation license, was issued "until the Constitutional Court issued its respective decision," and any legal error was "rectified" by the MEM's revocation of the suspension order.[1482] This is incorrect.

490. The MEM's suspension of Exmingua's exportation license lacked any legal basis and, in fact, the MEM never even purported to provide one. The Supreme Court's *amparo provisional* had no connection to Exmingua's exportation activities, which pertained only to Exmingua's exploitation license and to Exmingua's right to sell its products *locally* – and did not purport to affect any right to *export* product.[1483] Moreover, and contrary to Respondent's statement, the suspension was not made "until the Constitutional Court issued its respective decision"; there is no indication on the Resolution that it would be in effect until the Constitutional Court rendered "its respective decision." What is more, the Constitutional Court decision to which Guatemala refers was issued on 5 May 2016 (*i.e.*, two days after the MEM's suspension of the exportation license), while the MEM's revocation of the suspension was not issued until 24 October 2016 (*i.e.*, more than five months later), rendering nonsensical Guatemala's argument that "[a]fter Exmingua's appeal of the decision, MEM revoke[*sic*] the suspension in the months following the appeal."[1484]

491. Guatemala also is wrong in contending that, because it later revoked the Resolution, it did not cause harm or violate its obligations under the Treaty. To the contrary, the timing of the MEM's revocation underscores its bad faith. It ensured that Exmingua would be damaged by the MEM's unlawful, discriminatory, and arbitrary action because, as explained, despite lacking any legal basis for the suspension, the MEM waited for *five months* to revoke its Resolution – and it did so *one day after the license had expired*.[1485] The MEM thus guaranteed that Exmingua would not be able to

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whole - not dramatic incidents in isolation - which determines whether a breach of international law has occurred.") (CL-0036).

[1481] *See supra* § II.D.2; Clms' Mem. ¶¶ 99, 221, 231-232.

[1482] Resp's C-M ¶ 349.

[1483] *See* § II.D.2 *supra*; MEM, Resolution No. 146 dated 3 May 2016 (C-0140). *See also* Clms' Mem. ¶¶ 98, 221, 231-232.

[1484] Resp's C-M ¶ 349, n. 570 (citing Constitutional Court of Guatemala, Case No. 1592-2014, Decision dated 5 May 2016 (C-0143) and MEM, Resolution No. 5194 dated 24 Oct. 2016 **(**C-0142).

[1485] *See supra* § II.D.2; Clms' Mem. ¶¶ 99, 231-232.

export its concentrate. That inability persists, despite of the concentrate having been returned to Exmingua a few weeks prior to the filing of this Reply Submission.[1486]

492. In a similar scenario, the *Achmea v. Slovak Republic I* tribunal found that a temporary ban imposed by the State on distribution of profits amounted to a breach of FET – irrespective of the fact that the ban was ultimately lifted. The tribunal found that the FET breach occurred when the ban was introduced and explained that "the removal of the right to generate profits, coupled with a ban on the transfer of the portfolio, effectively deprived Claimant of access to the commercial value of its investment. The investment could neither be maintained so as to generate profits nor be sold. There was no way in which Claimant could recover the commercial value of its investment," and concluded that "the imposition of those measures upon the investment after it had been made was incompatible with the obligation to accord the investment fair and equitable treatment."[1487]

493. *Third*, as Claimants have shown, Guatemala has breached its FET obligation by failing to carry out the consultations that the Courts have ordered it to conduct and which were required by the Courts for Exmingua's license to regain effectiveness. As Claimants explained, despite having been ordered *more than five and a half years ago* to conduct the consultations, the MEM has not even commenced pre-consultations for Exmingua's Project. By contrast, moreover, the MEM commenced consultations for Oxec's project within one month of the Court's order, informing the Court that it executed a consultation plan, and completed those consultations within just over six months (during which time Oxec also was permitted to continue operating).[1488] Despite its voluminous FET discourse, Guatemala is *silent* on this aspect of its FET breach.

494. Elsewhere in its Counter-Memorial, Guatemala seeks to justify the MEM's inaction stating that the 11 June 2020 decision of the Constitutional Court "is still not binding."[1489] As noted in the press, the MEM has taken the position that it *cannot* begin consultations because the Constitutional Court's judgment in the case concerning Exmingua is not yet final. It was only in April 2021 that Exmingua discovered that the Government's stance was predicated on the MARN's filing of a request for clarification of the Court's judgment on 1 September 2020.[1490] Although such requests must be made within 24 hours of notification of the judgment, the Court accommodated the MEM's desire to

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[1486] *See supra* § II.D.5(b);

[1487] *Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic (I)*, PCA Case No. 2008-13, Final Award dated 7 Dec. 2012 ¶¶ 279-282 (CL-0268); *Id.* ¶ 35 (noting that the measures were lifted).

[1488] *See supra* § II.D.1(c); Clms' Mem. ¶¶ 105-108.

[1489] Resp's C-M ¶ 638.

[1490] *See supra* § II.D.4.

indefinitely delay taking action by waiting more than two months after its judgment was rendered to send official notification of the same to the MARN (notwithstanding the judgment being widely reported and officially notified to the MEM and Exmingua in June 2020).[1491] Despite a 48-hour deadline for ruling on such applications,[1492] the MARN's meritless request remains pending after more than nine months, thus enabling the MEM to contrive an excuse for not conducting the consultations.

495. The MEM's bad faith in this regard is underscored by the fact that it took tentative steps to prepare guidelines for consultations back in 2016 and prepared a report outlining those initial efforts, pursuant to the Court's order, which was submitted to the Court on 11 June 2020.[1493] Although Exmingua and Claimants repeatedly sought this report – or even an answer as to whether it ever was prepared – they were not notified of its existence until 3 March 2021, just before Respondent reluctantly produced the report in this Arbitration.[1494] In any event, the fact that the MEM took initial steps to speak with members of the community to prepare a plan for consultations, as reflected in the report, shows that the MEM understood that it was obligated to conduct consultations *pursuant to the Courts' earlier orders* and that its recent excuse that it must wait until the latest ruling is "final" is contrived. The MEM simply decided to give up even trying to do the very thing that the Court has insisted must be done for Exmingua's license to regain effectiveness.

496. In a similar scenario, the *Windstream* tribunal found that Canada violated its FET obligation by delaying issuance of necessary permits and authorizations needed to develop the investor's project, and by eventually imposing a moratorium that frustrated and effectively "cancelled" the project, because Canada "did relatively little to address the scientific uncertainty surrounding offshore wind that it had relied upon as the main publicly cited reason for the moratorium," and "[m]ost importantly, the Government did little to address the legal and contractual limbo in which Windstream found itself after the imposition of the moratorium."[1495] Likewise, here, Guatemala has refused to conduct the consultations, the alleged absence of which was the sole reason for suspending Exmingua's exploitation license and which is a precondition for Exmingua to regain its license. It follows that the

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[1491] Fuentes II ¶ 102.

[1492] *See supra* § II.D.4; Fuentes II ¶ 102; Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Request for Clarification by the MARN dated 1 Sept. 2020 (C-0668); *Amparo* Law, Art. 71 (C-0416).

[1493] *See supra* § II.D.4; Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Request for Clarification by the MARN dated 1 Sept. 2020 (C-0668); MEM Report submitted to the Constitutional Court on 11 June 2020 under cover of Letter from the MEM dated 9 June 2020, at 9-10, 12, 15 (C-0872).

[1494] *See supra* § II.D.1.

[1495] *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award dated 27 Sept. 2016 ¶¶ 378-379 (CL-0210); *Id.* ¶¶ 5, 189, 378-382.

desire for State-led ILO Convention 169 consultations is not what motivates Guatemala's actions in this case. A similar conclusion as that made in *Tecmed*, where the tribunal found that Mexico violated its FET obligation because its denial of a permit was not based on any misconduct of the claimant's subsidiary, but instead was designed to serve political ends with respect to the community opposition,[1496] must be drawn here.

497. *Fourth*, Claimants in their Memorial demonstrated that Guatemala breached its FET obligation by arbitrarily and unlawfully *de facto* suspending the Santa Margarita exploration license and making it impossible for Exmingua to obtain an exploitation license for the Santa Margarita area, all of which deprived Claimants of regulatory and legal certainty and left the Tambor Project and Claimants in a protracted state of limbo.[1497] Guatemala, in turn, claims that the MEM's requirement that Exmingua submit an EIA for Santa Margarita was not arbitrary[1498] and there was no *de facto* or *de jure* suspension of the Santa Margarita exploration license.[1499] These objections are misplaced.

498. Guatemala's assertion that the MEM's requirement of an EIA for Santa Margarita is not arbitrary[1500] misses the point. Contrary to Guatemala's contention, Exmingua did not request that the MEM "dispense with" "the [requirement] of an EIA in order to grant the exploitation permit,"[1501] that "the MARN or the MEM abrogate this rule" or that Guatemala "repeal [this] substantive law."[1502] Rather, Exmingua requested *assistance* from the MEM and *guidance* as to how to conduct the consultations in the face of the protests and blockades,[1503] and further requested that the MEM suspend its demand for submission of the EIA until Exmingua regained access to the Santa Margarita area.[1504] It was arbitrary and in bad faith for the MEM first to refuse to assist Exmingua with conducting the consultations required for the EIA or to provide any guidance as to how it should do so in the face of the protests and blockades, and then to impose and refuse to revoke the arbitrary 30-day deadline for Exmingua to submit the completed EIA, when the MEM knew that it would be impossible for Exmingua to comply.

[1496] *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award dated 29 May 2003 ¶¶ 44, 163-164, 172-174 (CL-0122).

[1497] Clms' Mem. ¶¶ 242-249; *see also William Ralph Clayton* et al. *v. Gov't of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 Mar. 2015 ¶¶ 454, 592, 594 (CL-0088); *Windstream Energy LLC v. Gov't of Canada*, NAFTA, PCA Case No. 2013-22, Award dated 27 Sept. 2016 ¶¶ 378-379, 382 (CL-0210).

[1498] Resp's C-M ¶¶ 357-361.

[1499] *Id.* ¶¶ 362-363.

[1500] *Id.* ¶¶ 357-361.

[1501] *Id.* ¶ 451.

[1502] *Id.* ¶¶ 359-360.

[1503] *See supra* § II.D.3.

[1504] Letter from Exmingua to the MEM, attaching Notary Public's Certification dated 22 Mar. 2017 (C-0013).

499. Further, as also explained, given the MEM's refusal for more than five years to conduct the Court-ordered ILO Convention 169 consultations for Exmingua's Progreso VII license, there was no reasonable prospect of the MEM conducting any consultations for the Santa Margarita area, whether for the exploration or the exploitation license, which the Guatemalan courts have now insisted is necessary.[1505] As it would be legally and economically imprudent to continue exploration under the license without any hope of obtaining an exploitation license, the MEM's arbitrary, unlawful and bad faith actions thus have *de facto* suspended Exmingua's Santa Margarita exploration license.[1506] Tellingly, Guatemala simply ignores this point.

500. In short, all of the MEM's actions – failing to provide assistance or guidance to Exmingua for conducting the consultations; imposing and refusing to revoke the arbitrary 30-day deadline for submission of the Santa Margarita EIA; and refusing to conduct the Court-ordered consultations for the Progreso VII license – were in keeping with the State's *de facto* moratorium on issuing new licenses, which was non-transparent, unlawful (as it disregarded the Mining Law and Regulations), arbitrary, and in violation of Guatemala's good faith obligation. As in *Arif v. Moldova*, the manner in which Guatemala is "wash[ing] its hands of the consequences of its own illegality is . . . most reprehensible . . . [and its] inertia in the face of the paralysis and then destruction of [Claimants'] investment is a breach of the [FET] standard."[1507]

501. *Fifth*, in their Memorial, Claimants established that Guatemala breached its FET obligation by arbitrarily and unlawfully pursuing baseless criminal charges and impounding Exmingua's gold concentrate, in a pattern of abusive misconduct.[1508] In its Counter-Memorial, Guatemala asserts that the undercover operation, criminal charges and the impoundment were neither unlawful nor arbitrary.[1509] This is incorrect.

502. As explained above, Guatemala's contention that "there was no 'undercover operation' to detain the employees of Exmingua who were transporting the gold concentrate" and, instead, there "was simply a routine traffic stop,"[1510] is belied by the Guatemalan Civil Police investigation report,

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[1505] Clms' Mem. ¶¶ 124, 244.

[1506] *Id.* ¶¶ 124, 244.

[1507] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award dated 8 Apr. 2013 ¶ 547 (CL-0126).

[1508] Clms' Mem. ¶¶ 125-132, 237-241 (citing cases).

[1509] Resp's C-M ¶¶ 350-356.

[1510] *Id.* ¶ 354.

which expressly describes what occurred as an "undercover operation."[1511] Although there were no grounds for this "undercover operation," Guatemala nevertheless tenaciously pursued criminal proceedings. In fact, the groundless nature of the charges was confirmed when they were dismissed the very next day for lack of evidence, further undermining Guatemala's statement that the "stop" "resulted in the determination that the individuals involved were blatantly committing a crime."[1512] Despite this, the Public Prosecutor's Office repeatedly challenged the dismissal over the next three years before the Fourth Criminal Court of First Instance, the Supreme Court and the Constitutional Court,[1513] while it kept Exmingua's concentrate impounded.

503. Guatemala's claim that, despite almost *five years* having passed since the case was first dismissed, "the criminal investigation is still open and is still being conducted by the competent authorities in Guatemala,"[1514] further confirms Guatemala's dogged harassment of Exmingua. In fact, only three months prior to the date of this Reply Submission, in March 2021, the Public Prosecutor's Office confirmed that "no further proceedings are pending and all necessary investigations have already been conducted in this proceeding," and tellingly remarked that "[h]olding personal or real property that is closed or immobilized unnecessarily could make us liable for abuse of authority or thwarting access to private property. . . . if the investigations required for criminal action in this proceeding were yet pending, it would be reprehensible because we've had years to build a strong case."[1515] That the concentrate was only released in late May 2021, weeks before the filing of this Reply Submission,[1516] confirms Guatemala's arbitrary, unlawful and bad faith treatment of Claimants' investment. Nor has the harm suffered been eradicated by this return because, as described, Exmingua currently has no permission to export the concentrate and will need to secure a buyer for the same, as well as incur costs in adjusting its moisture level.[1517] Absent this, the release of the concentrate does not mitigate any of the damage caused by Guatemala.

504. *Finally*, Guatemala also violated its FET obligation by unreasonably and disproportionately impounding Exmingua's bank accounts.[1518] As noted, immediately after the Court ordered

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[1511] *See supra* § II.D.5; Guatemalan Civil Police, Investigation Report dated 9 May 2016, at 1-2 [at 2 ENG] (C-0148).

[1512] Resp's C-M ¶ 354.

[1513] *See supra* § II.D.5; Clms' Mem. ¶¶ 127, 129, 131; Fuentes I ¶¶ 185-193; Fuentes II ¶¶ 163-167.

[1514] Resp's C-M ¶ 355.

[1515] Fourth Criminal Court of First Instance, Case No. 1069-2016-00228, Transcript of hearing held on 25 Mar. 2021, at 6, 10 [at 6, 10 ENG] (C-0677); *see also* Fuentes II ¶ 164.

[1516] *See supra* § II.D.5(b); Clms' Mem. ¶ 127; Kappes I ¶ 140.

[1517] *See supra* § II.D.5(b); Kappes II ¶ 78.

[1518] *See supra* § II.D.5(b); Kappes II ¶ 79.

Exmingua's concentrate released, the Prosecutor General's Office froze Exmingua's bank accounts, and seized the money therein, to enforce a five-year-old fine issued by the MEM. This fine was imposed on Exmingua for ceasing operations in May 2016, instead of two months earlier, in March 2016, when the MEM issued its suspension order.[1519] As explained, the MEM's March 2016 order was entirely unexpected, as the MEM had just announced that it would be *impossible* for it to suspend Exmingua's license, which it had validly issued years ago and, that very day, had filed a submission with the Court stating the same.[1520] Despite this, the MEM fined Exmingua for not immediately shutting down its operations.

505. Guatemala now takes the position that Exmingua was *required* by the Court's November 2015 *amparo provisional* ruling to shut down immediately upon issuance of that ruling,[1521] even though Exmingua was not a party to the proceeding before the Court, had not been heard, and was not notified of the court proceedings or the *amparo provisional* ruling until months later.[1522] Yet, at the same time, Guatemala argues that the MEM was *not* required to comply with that same Court's order to conduct consultations, because that judgment was not final.[1523] Indeed, Guatemala continues to argue that it *still* is not required to comply with *any* of the Courts' rulings directing it to conduct consultations – including the Constitutional Court's judgment on Exmingua's appeal of the *amparo definitivo*, because the MARN's request for clarification remains pending.[1524] In this way, Guatemala has acted in an inconsistent, arbitrary, and discriminatory manner in implementing *some* of the Court's rulings but not *others*, and then fining Exmingua for not immediately complying with its orders.

506. Furthermore, Guatemala's freezing of Exmingua's bank accounts is disproportionate, retaliatory, and done in bad faith. One of the principal issues in dispute before this Tribunal is the legality, under the Treaty and international law, of Guatemala's indefinite suspension of Exmingua's Progreso VII license; in the absence of Guatemala's Treaty breaches, that license would *not* have been suspended and, thus, Exmingua would *not* have been fined by the MEM for operating for two months in violation of that suspension. For Guatemala to freeze Exmingua's bank accounts just weeks before the filing of this Reply Submission to enforce compliance with one of the very measures that is the

[1519] MEM Resolution No. 384 dated 16 Nov. 2016 (C-0904).
[1520] *See supra* § II.D.2; Clms' Mem. ¶¶ 97-98.
[1521] Resp's C-M ¶ 355.
[1522] *See supra*, § II.D.1; Clms' Mem. ¶¶ 87-88.
[1523] Resp's C-M ¶ 408.
[1524] *Id.* ¶ 638.

subject of this dispute unnecessarily aggravates the dispute before this Tribunal and is the epitome of bad faith. The freezing order, moreover, was wholly disproportionate because, as Guatemala is aware, Exmingua continues to perform environmental monitoring on site – which is subject to periodic MEM and MARN inspection – even though this is costly and Exmingua has no operating revenue, so must rely on Claimants to fund these expenditures by making deposits into its now-frozen bank accounts.[1525] By freezing these accounts, Guatemala is thus also trying to coerce Claimants into making even *further* investments into Guatemala (by indirectly paying the fine, as any amounts deposited into the accounts up to the amount of the fine will be seized by Guatemala), notwithstanding that Guatemala has completely destroyed the value of Claimants' investments. This continued harassment most certainly violates Guatemala's FET obligation.

D. Guatemala Failed To Accord Claimants' Investments Full Protection And Security

507. As Claimants explained in their Memorial, the FPS obligation under DR-CAFTA Article 10.5 is "a core component of the minimum standard of treatment" under the Treaty,[1526] and requires Guatemala "to provide [to covered investments] the level of police protection required under customary international law,"[1527] including by exercising "vigilance" and "due diligence."[1528] In addition, Claimants explained that Annex 10-B of the Treaty clarifies that the FPS standard "refers to all customary international law principles that protect the economic rights and interests of aliens."[1529] Claimants further explained that it is not sufficient for a State to merely refrain from actively harming an investment; rather, the FPS obligation requires the State to adopt a "pro-active"[1530] attitude, and, thus, requires "active, and not merely passive, conduct by the host State that may go beyond the mere abstention from prejudicial conduct,"[1531] and that tribunals have found FPS violations where States

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[1525] *See supra* § II.D.5(b); Clms' Mem. ¶ 100; Kappes ¶ 134; Kappes II ¶ 79.

[1526] *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award dated 29 June 2012 ¶ 238 (CL-0068); Clms' Mem. ¶ 251.

[1527] DR-CAFTA, Arts 10.5.1, 10.5.2(b) (CL-0001); Clms' Mem. ¶ 251.

[1528] *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award dated 1 June 2009 ¶ 447 (CL-0167); *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award dated 28 July 2015 ¶ 596 (CL-0260); *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award dated 4 May 2016 ¶ 351 (CL-0015); *Ampal-American Israel Corp.and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss dated 21 Feb. 2017 ¶ 244 (CL-0135); Clms' Mem. ¶ 252.

[1529] DR-CAFTA, Annex 10-B (CL-0001); Clms' Mem. ¶ 251.

[1530] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award dated 14 July 2006 ¶ 372 (CL-0149); *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award dated 4 May 2016 ¶ 356 (CL-0015); Clms' Mem. ¶ 252.

[1531] *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA No. 2012-2, Award (redacted) dated 15 Mar. 2016 ¶ 6.81 (CL-0138); Clms' Mem. ¶ 252.

have failed to protect investments from damage caused by public demonstrations, workers' protests, armed militias and civilian mobs, groups of local individuals, and local business groups.[1532]

508. In this regard, Claimants demonstrated that Guatemala failed to take reasonable measures to ensure that Exmingua had access to the Project site and the ability to conduct the social studies for the Santa Margarita EIA, thereby breaching its Treaty obligation.[1533] In particular, Claimants demonstrated that the National Civil Police refused to take reasonable measures to remove the blockade at the Project site that commenced in early 2016, after the Supreme Court's *amparo* ruling and the MEM's initial refusal to suspend the exploitation license for Progreso VII.[1534] Claimants also demonstrated that the Constitutional Court refused to grant Exmingua an *amparo* ordering the National Civil Police to remove the blockade on the grounds that Exmingua's Progreso VII exploitation license had been suspended.[1535] As Claimants explained, Guatemala's failure to act prevented Exmingua from entering the Project site, using its laboratory facilities, and having consultants conduct the social studies required for the EIA in furtherance of Exmingua's application for an exploitation license for Santa Margarita.[1536] As Claimants further explained, in December 2016, the MEM exacerbated the situation by imposing a 30-day deadline on Exmingua to submit a completed and approved EIA for Santa Margarita (including the results of the consultations with the local communities), and subsequently denying Exmingua's request to suspend that requirement in light of the blockade and protests, in keeping with the State's *de facto* moratorium on issuance of mining licenses.[1537]

509. In its Counter-Memorial, Guatemala asserts that "Claimants try to allude" that the Treaty's FPS provision includes protection for economic rights, characterize Claimants' claim as being based upon economic rights, and assert that an FPS breach "under the customary international law only [occurs] where a state failed to provide police protection against physical invasion of property or person."[1538] Relying on *Copper Mesa v. Ecuador*, Guatemala further asserts that a tribunal must balance "the legitimate interests of the foreign investor with the legitimate interests of the host State

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[1532] Clms' Mem. ¶ 253.
[1533] *Id.* ¶ 250.
[1534] *Id.* ¶ 258.
[1535] *Id.* ¶¶ 261-262.
[1536] *Id.* ¶¶ 258-261.
[1537] *Id.* ¶¶ 263-264.
[1538] Resp's C-M ¶¶ 433-434.

and others, including (especially) its own citizens and local residents."[1539] In addition, Guatemala argues that Claimants have failed to make a *prima facie* case for an FPS violation.[1540] In this regard, according the Guatemala, "Claimants have not shown that there was a continuous obstruction to the project site in 2016,"[1541] "nothing was preventing Exmingua from accessing Santa Margarita,"[1542] and "Claimants have not demonstrated that they had incurred loss or damage."[1543] Guatemala thus concludes that it complied with its obligation "to take reasonable measures of prevention" and that it "has not breached its obligation to exercise due diligence" in respect of its FPS obligation.[1544] As demonstrated below, these assertions are wrong.

510. *First*, contrary to Guatemala's contentions, Claimants' FPS claim arises *directly* out of Guatemala's failure to take reasonable measures to "ensure that Exmingua had *access to the Project sites*."[1545] Claimants' claim thus squarely concerns Guatemala's failure to provide police protection, and Guatemala mischaracterizes it when it argues that it concerns "economic rights."[1546] In any event, Annex 10-B of the Treaty expressly provides that "[w]ith regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that *protect the economic rights* and interests of aliens."[1547] Thus, while "[i]t is beyond doubt that the standard of full protection and security relates to the physical protection of the investor and its assets,"[1548] it also is clear that Guatemala's obligation extends to ensuring Exmingua's enjoyment of its economic rights, which include, *inter alia*, its right to freely move around, use, and develop its assets.[1549]

511. *Second*, Guatemala misconstrues the relevant legal standard for FPS and, in this regard, fails to recognize that the language it relies on from the *Copper Mesa v. Ecuador* award applied specifically to the FET obligation, apart from the obligation to provide FPS. Specifically, the *Copper Mesa* tribunal observed that "[u]nder *[the] FET standard*, there is a *balancing exercise* permitted to

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[1539] *Id.* ¶ 436 (quoting *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA No. 2012-2, Award dated 15 Mar. 2016 ¶ 6.81 (CL-0138)) (Guatemala's emphasis omitted).

[1540] Resp's C-M ¶¶ 247-251.

[1541] *Id.* ¶ 444.

[1542] *Id.* ¶ 451.

[1543] *Id.* ¶ 454.

[1544] *Id.* ¶¶ 439-442.

[1545] Clms' Mem. ¶ 250 (emphasis added).

[1546] Resp's C-M ¶¶ 433-434.

[1547] DR-CAFTA, Annex 10-B (CL-0001).

[1548] Christoph Schreuer, Full Protection and Security, J. Int'l Dispute Settlement 1, at 2 (June 2010) (CL-0189), at 2.

[1549] Fuentes I ¶ 76; Fuentes II ¶ 89.

the host State, weighing the legitimate interests of the foreign investor with the legitimate interests of the host State and others, including (especially) its own citizens and local residents. Under *the FPS standard*, the obligation . . . imposes a . . . duty more akin to the *exercise of due diligence*."[1550] The *Copper Mesa* award thus accords with the voluminous authorities in the record as to the standard of protection required by a State to comply with its FPS obligation.

512. The *Copper Mesa* tribunal's finding that Ecuador breached its FPS obligation, moreover, supports Claimants' claim. The issue in that case was whether Ecuador should have responded to "anti-miners . . . so as to ensure that the Claimant, as the concessionaire . . . could gain access to the [] concessions in order to carry out the required consultations and other activities required for its [Environmental Impact Study]."[1551] As is the case here, *Copper Mesa* involved a group of anti-mining protesters opposed to "[all] mining, whatever phase or form it might take"[1552] in an area where "a significant part of the local communities was pro-mining."[1553] According to the tribunal, "certain anti-miners were not angels" and "road-blocks established by some anti-mining communities [including an ecological defense group, which sponsored the protests] cause[d] [] severe difficulties."[1554]

513. The *Copper Mesa* tribunal concluded that Ecuador "breach[ed] . . . [the] FPS standard[] [because] . . . . rather than giving legal force to the factual effect of the anti-miners' physical blockade of the [] concessions, the Respondent *should have attempted something to assist* the Claimant in *completing its consultations* and other requirements for the EIS."[1555] In this regard, the tribunal observed that, in particular, "what [Ecuador] could not do under the Treaty . . . was to make the situation even worse, by making it legally impossible . . . for the Claimant to complete its EIS as the concessionaire."[1556] Ecuador's actions – "in sid[ing] so completely with the anti-miners as to make it impossible, both legally and physically, for the Claimant to complete its EIS, with inevitable consequences"[1557] – thus constituted "unlawful conduct under the [] FPS standard."[1558]

[1550] *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 Mar. 2016 ¶ 6.81 (CL-0138) (emphases added).
[1551] *Id.* ¶ 6.82.
[1552] *Id.* ¶ 4.28.
[1553] *Id.*
[1554] *Id.* ¶¶ 4.96, 4.131.
[1555] *Id.* ¶ 6.83 (emphases added).
[1556] *Id.* ¶ 6.84.
[1557] *Id.*
[1558] *Id.* ¶ 6.85.

514. *Third*, Guatemala's contention that Claimants have failed to demonstrate – or even make a *prima facie* case – that Guatemala breached its FPS obligation is wrong. To the contrary, Guatemala's measures are akin to those that were at issue in *Copper Mesa*: Like Ecuador, Guatemala "sided" with the "anti-miners' physical blockade," refused to do anything to assist Exmingua with "completing its consultations and other requirements for the EIS," and, instead, made "the situation even worse" by imposing an arbitrary and impossible 30-day deadline for Exmingua to submit its completed Santa Margarita EIA.[1559]

515. Further, contrary to Guatemala's assertion that "Claimants have not shown that there was a continuous obstruction to the project site in 2016" and "nothing was preventing Exmingua from accessing Santa Margarita,"[1560] Claimants have demonstrated that, beginning in January 2016, MadreSelva and CALAS organized protests at the Project site that occurred nearly every day, 24 hours a day, from 21 January 2016 until at least 30 April 2018.[1561] These protesters "made threats, which jeopardize[d] [Exmingua's] personnel and the environmental managers," and its consultants "refuse[d] to go there out of fear for their physical integrity."[1562] These threats were not mild taunts – rather, they included the threat of being "burned alive" and "physically eliminated."[1563] Further, these protesters had shown a propensity to engage in violence, including by, *inter alia*, holding individuals hostage, slashing a worker with a machete, pointing a gun at the head of another worker, and beating sixteen other people so severely that they were sent to the hospital.[1564] The presence of these protesters thus was continuous and menacing; Exmingua's consultants avoided the area for good reason.

516. Yet, fully aware that these "demonstrations [had] been established as PERMANENT"[1565] for every day of each month in 2016[1566] – and that these protesters had threatened to "block the entire capital if necessary"[1567] – the police were unwilling to take action to remove them. Although Guatemala asserts that there was periodic "intervention of the police" and a "dispatch in front of the

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[1559] *See* Clms' Mem. ¶ 254; *see also supra* § II.D.

[1560] Resp's C-M ¶¶ 444, 451.

[1561] *See supra* § II.D.3.

[1562] Exmingua letter to the Ministry of Energy and Mines dated 22 Mar. 2017 (C-0013); *see also supra* § II.D.

[1563] *See supra* § II.D.3.

[1564] *Id.* § II.D.3. Even intermittent intervention by police in response to violence is insufficient to fulfil a State's full protection and security obligations. *See Kristof de Sutter, Peter de Sutter and (DS)2, S.A. v. Republic of Madagascar (II)* (ICSID Case No. ARB/17/18), Award dated 17 Apr. 2020 ¶ 339 (CL-0131).

[1565] CALAS' Notification of Protests dated 7 Mar. 2016 (C-0880).

[1566] *Id.*

[1567] Joel Suncar, "Demonstrators from La Puya take diagonal 17 in front of the MEM," *La Prensa Libre* dated 4 Mar. 2016 (C-0874).

mine,"[1568] the mere presence of police and mild intervention does not satisfy a State's FPS obligation. As the tribunal recently observed in *De Sutter v. Madagascar*, "the passivity of the police gave the demonstrators a strong signal: the field was free."[1569]

517. Indeed, Guatemala's evidence of police intervention during this period is entirely unreliable. What Guatemala purports to be a National Civil Police Report describing events *in 2016* is, in fact, a report describing events *in 2012*, which Guatemala obscures by failing to provide a document date in its references, opting instead to repeatedly cite to "Report of National Civil Police (R-0052)."[1570] Furthermore, even if Guatemala was describing events from a different report of the National Civil Police dated 10 May 2016 (R-0117), this report is entirely self-serving, as it was prepared *less than one month* after Exmingua filed its *amparo* action against the President of Guatemala, the Ministry of Interior and the Director General of the National Civil Police for failing to remove the blockade.[1571] Nor is there any police report of events post-dating May 2016, notwithstanding that the protests continued every day of that year and the following year.

518. Incredulously, although Guatemala states, *in bold text*, that "no inconvenience or conflict has arisen" since "04/29/2016 to the present date" – with a sole citation to "Report of National Civil Police (R-0052)" – this quoted language does not appear in either the 2012 *or* the 2016 police report. Instead, the text comes from a *19 November 2020 report* to the *International Affairs Office of the Guatemalan Attorney General*, in response to a request from that office made two days earlier, on 17 November 2020.[1572] This "report" no doubt was designed for use in Guatemala's Memorial dated 7 December 2020.[1573] Unsurprisingly, the report – which took just two days to produce – includes no further information other than that found in the 2016 report, and summarily concludes that "[from the last incident in that report] to the present date, no inconvenience of conflict has arisen in the aforementioned place."[1574]

519. As Exmingua observed in its *amparo* action filed on 22 April 2016 against the President of Guatemala, the Ministry of Interior and the Director General of the National Civil Police, the constant

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[1568] Resp's C-M ¶ 444.

[1569] *Kristof de Sutter, Peter de Sutter and (DS)2, S.A. v. Republic of Madagascar (II)* (ICSID Case No. ARB/17/18) Award dated 17 Apr. 2020 ¶ 339 (CL-0311).

[1570] *See* Resp's C-M ¶ 445 (citing Report of National Civil Police (R-0052) and describing events in 2016).

[1571] Clms' Mem. ¶ 118; Constitutional Court of Guatemala, Case No. 1904-2016, Ruling denying Exmingua's request for an amparo against the President, the Ministry of Interior, and the Director General of the National Civil Police dated 2 Mar. 2017 (noting filing date of 22 Apr. 2016) (C-0147).

[1572] Report to the International Affairs Office of the Guatemalan Attorney General dated 19 Nov. 2020 (C-0989).

[1573] *Id.*

[1574] *Id.*

and continuous presence of such protesters – who "deny any worker, supplier or visitor access or entry to the mining facilities" – "has resulted in a series of personal damages," "bodily injuries," and "even the risk of death."[1575] Exmingua further observed that the police "have failed to maintain public order" and "adopt a wait-and-see attitude,"[1576] and thus requested that the Constitutional Court order that "all necessary measures in respect of the blockades" be adopted "to preserve public order."[1577] The Constitutional Court denied Exmingua's request, incorrectly asserting that "[t]he fact that the [] mining project remains suspended suggests that the threat claimed by the petitioner cannot be considered certain or imminent."[1578] Exmingua was thus was left unable to freely move around, use, and develop its assets.

520. *Finally*, contrary to Guatemala's assertion that "Claimants have not demonstrated that they incurred loss or damage,"[1579] Claimants have shown that the MEM and the MARN failed to respond to Exmingua's requests for assistance in completing the EIA, making such work impossible, and then aggravated the situation. Specifically, beginning in December 2016 and while the protests were ongoing, the MEM made repeated and arbitrary demands that Exmingua file the EIA for the Santa Margarita license within 30 days.[1580] Although Exmingua notified the MEM that the area was blocked and consultations for the EIA social studies could not be conducted due to threats by protesters, and requested that the EIA requirement be suspended, *the MEM did not respond* to this request.[1581] Exmingua also asked the MARN to provide "guidelines" and "recommendations" to complete the public consultations for the EIA, but *Exmingua did not receive any response* from the MARN.[1582]

521. Instead of assisting Exmingua in completing the EIA, the MEM directed Exmingua to "regularize" its application for the Santa Margarita exploitation license within 30 days.[1583] Due to the ongoing protests and threats (of which the MEM was fully informed), Exmingua was unable to comply with this direction, which resulted in its license application being archived.[1584] The practical

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[1575] Constitutional Court of Guatemala, Case No. 1904-2016, Ruling denying Exmingua's request for an amparo against the President, the Ministry of Interior, and the Director General of the National Civil Police dated 2 Mar. 2017, at 1 (C-0147).

[1576] *Id.* at 2.

[1577] *Id.*

[1578] *Id.* at 6.

[1579] Resp's C-M ¶ 454.

[1580] *See supra* § II.D.3.

[1581] *Id.*; Clms' Mem. ¶ 120.

[1582] *See supra* § II.D.3; Clms' Mem. ¶ 120.

[1583] *See supra* § II.D.3; Clms' Mem. ¶ 123.

[1584] *See supra* § II.D.3; Clms' Mem. ¶ 123.

effect of the continued protests and blockades, the MARN's and the MEM's refusal to assist Exmingua in completing consultations (and their making it impossible to complete the consultations by imposing a fabricated deadline) – combined with the State's *de facto* moratorium on issuance of new mining licences – is that Exmingua had no ability to obtain its exploitation license for the Santa Margarita license area.[1585] In these circumstances, Guatemala's failure to provide FPS and the resulting damage is apparent.

E. Guatemala's Courts Have Denied Justice To Claimants' Investment

522. As shown in Claimants' Memorial and further demonstrated below, by retroactively, and in a discriminatory manner, applying a new legal requirement to deprive Exmingua of its vested rights and the right of certainty, denying Exmingua fundamental due process rights, including timely notice and the right to be heard, and failing to rule on Exmingua's appeal within the legally proscribed or a reasonable timeframe, while ruling on other similar appeals, Guatemala denied justice to Claimants' investment.[1586]

1. The Treaty Prohibits Denial Of Justice

523. In their Memorial, Claimants demonstrated that a State violates the prohibition not to deny justice under Article 10.5(1) of the DR-CAFTA where the State's courts administer justice in a seriously inadequate manner, including by violating procedural and/or substantive due process rights, including by unduly delaying proceedings, where a court's actions or resulting decisions shock a sense of judicial propriety, where judicial decisions are biased, politically motivated, or otherwise arbitrary, where the courts clearly and maliciously misapply the law, or where they apply the law in a discriminatory manner.[1587]

524. Guatemala agrees that, for a violation of the denial of justice standard to be established, its courts must have engaged in "serious and egregious conduct that shocks, or at least surprises, a sense of judicial propriety."[1588] Guatemala also agrees with the standard as formulated by the tribunal in *Helnan v. Egypt*, which defined denial of justice to include "deficiencies, *in procedure or in*

[1585] *See supra* § II.D.3.

[1586] Clms' Mem. ¶¶ 266-312.

[1587] *Id.* ¶¶ 267-273.

[1588] Resp's C-M ¶ 289 (internal quotation marks omitted).

substance, [that] are shown in regard to . . . local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law."[1589]

525. Nonetheless, Guatemala then seeks to limit the application of that standard to *procedural* due process violations, asserting that "[a] denial of justice is not concerned with a substantive denial of justice"[1590] and that "the Tribunal should dismiss any challenges against the *substantive* decision made by Guatemalan courts."[1591] In support, Guatemala erroneously relies on the text of DR-CAFTA Article 10.5(2)(a), which provides that "[t]he obligation . . . to provide . . . 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."[1592] The text of this provision, however, refers generally, without any limitation, to "the principle of due process," which includes both procedural and substantive due process.

526. As Professor Douglas has explained, a "purely 'procedural' approach [to the threshold for a denial of justice] is unsustainable as a matter of principle":

> The purpose of a system for the administration of justice is to decide cases and generate good outcomes. The merits of an outcome are inexorably linked to the substantive law governing the rights and obligations in question . . . .[1593]
>
> A foreign national suffers a procedural injustice in seeking to vindicate a substantive right if the adjudicative procedure does not attach an appropriate level of importance to the risk of moral harm that could be inflicted upon the national by an erroneous decision on the substantive right in question or if the adjudicative procedure does not reflect a consistent weighting of the importance of the moral harm as reflected in the State's own evaluation of moral harm embedded in the law as a whole.[1594]

527. Elsewhere in its Counter-Memorial, Guatemala quotes Professor Paulsson's monograph with the phrases, "denial of justice is always procedural"[1595] and "the general rules [*sic*] is that the final

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[1589] Resp's C-M, at n.466 (quoting *Helnan Int'l Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award dated 3 July 2008 ¶ 106 (RL-0192)) (emphasis added).

[1590] Resp's C-M ¶ 422.

[1591] Resp's C-M ¶ 302 (emphasis added).

[1592] DR-CAFTA, Art. 10.5(2)(a) (CL-0001); Resp's C-M ¶ 302 (erroneously referring to Article 10.5(2)(b)).

[1593] Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63 INT'L & COMP. L.Q 867, 870 (2014) (RL-0191).

[1594] Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63 INT'L & COMP. L.Q 867, 900 (2014) (RL-0191).

[1595] Resp's C-M, at n.478 (quoting "Jan Paulsson, *Denial of Justice in International Law*, p. 7 (CL-0171)" (*sic*)," although the cited page is not contained in the referenced exhibit nor elsewhere on the record).

word as to the meaning of national law should be left with the national judiciary."[1596] Guatemala misleadingly quotes these phrases selectively and out of context. As the chapter of that monograph specifically addressing "[j]udgments in breach of national law" reveals, Professor Paulsson considers a procedural denial of justice to include what others may categorize as a substantive denial of justice: "Whenever an international tribunal rejects a decision founded on a national judicial authority's interpretation of its own law, it does so for reasons which are properly understood as based on a determination that the process was defective."[1597] Professor Paulsson explains that, when faced with a substantive judicial decision that "no judge could reasonably have reached… the inference is that it was not rendered by an independent judicial mind deciding according to its conscience."[1598] Accordingly, while Professor Paulsson's approach may appear different from that of the majority of investment tribunals, as described in Claimants' Memorial, the difference is merely theoretical, and does not affect the scope of the conduct that gives rise to a denial of justice.[1599]

528. Additionally, Guatemala alleges that Claimants "skipped" the element of exhaustion of domestic remedies, but fails even to allege how Claimants have not exhausted available domestic remedies.[1600] In making this allegation, Guatemala ignores that Claimants explained in great detail in their Memorial the many steps Exmingua took before the Guatemalan courts to exhaust its domestic remedies, including in particular its appeal in the *amparo* proceeding brought by CALAS, which culminated in the Constitutional Court's decision of 11 June 2020.[1601] Indeed, Guatemala ironically blames Exmingua's exhaustive exercise of its domestic remedies for the Constitutional Court's delay in issuing that decision.[1602] Accordingly, there can be no question that Exmingua has exhausted its domestic remedies. While the Constitutional Court's decision may not yet be final in a technical sense, this is due only to the Constitutional Court's blatant disregard, again, of the statutory timeframe to rule on the MARN's contrived request for clarification.[1603] In any event, this does not change the fact that no further remedy is available to Exmingua.

[1596] Resp's C-M ¶ 422 (quoting JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW, at 73 (2005) (CL-0171)).

[1597] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW, at 87 (2005) (CL-0171).

[1598] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW, at 89 (2005) (CL-0171).

[1599] *See* Clms' Mem. ¶¶ 267-273.

[1600] Resp's C-M ¶ 286; *see also Id.* ¶ 401.

[1601] Clms' Mem. ¶¶ 70-96, 103-104, 118, 132-133.

[1602] *See* Resp's C-M ¶ 415 ("[T]he progress of the Constitutional Court's decision was affected by the appeal filed by Exmingua and other parallel proceedings related to Exmingua's exploitation license for Progreso VII….").

[1603] As Professor Fuentes explains, under Article 71 of the *Amparo* Law, a clarification request must be filed within 24 hours of notification of the underlying decision, and the Constitutional Court must rule on such a request within 48 hours. Fuentes II ¶ 102; *Amparo*, *Habeas Corpus* and Constitutionality Law, Art. 71 (C-0416). The MARN filed its clarification request on 1 September 2020, purportedly having been notified of the Constitutional Court's decision on 31 August 2020.

2. The Conduct Of Guatemala's Courts Amounts To A Denial Of Justice

529. As demonstrated above and in Claimants' Memorial, supported by Professor Fuentes' expert opinions, Guatemala's courts seriously violated Exmingua's fundamental procedural and due process rights,[1604] blatantly violated Exmingua's substantive acquired rights,[1605] and discriminated against Exmingua.[1606] In combination, these violations have resulted in the egregious injustice that Exmingua's operations have been suspended for over five years, and continue to be suspended indefinitely, for the contrived purpose of allowing Guatemala to conduct consultations, which it has not even begun.

530. To the extent that Guatemala addresses the procedural due process violations, it seeks to do so in isolation, but it has nothing to say about the extremely arbitrary and inequitable consequences the accumulation of those violations has imposed on Exmingua.

531. It is telling that Guatemala has not even attempted to defend its courts' decisions on the merits.[1607] Guatemala's 300-page Counter-Memorial devotes only a single heading to the argument that "[t]he suspension of the exploitation licence was consistent with Guatemalan law."[1608] The three paragraphs under that heading address superficially the consultation requirement under ILO Convention 169, but do not even mention the suspension.[1609] The Constitutional Court's decision in the *Cementos Progreso* case, to which Guatemala refers in this context (without providing a citation), does not help Guatemala either.[1610] As Professor Fuentes explains, the Constitutional Court in that case ordered consultations to proceed, but without suspending the operations of the mining project at issue.[1611]

Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, MARN Request for Clarification dated 1 Sept. 2020, at 1 (C-0668). While the Constitutional Court thus should have ruled on the MARN's clarification request in early September 2020, it still has failed to do so more than more than nine months later. *See supra*, § II.D.4.

[1604] *See supra*, § II.D.1.a; Clms' Mem. ¶¶ 133-139; 276-295; Fuentes I ¶¶ 106-162; Fuentes II ¶¶ 100-159.

[1605] *See supra*, § II.D.1.b; Clms' Mem. ¶¶ 140, 296-305; Fuentes I ¶¶ 163-184; Fuentes II ¶¶ 160-162.

[1606] *See supra*, § II.D.1.c; Clms' Mem. ¶¶ 306-311 ; Fuentes I ¶¶ 159-162, 177-178, 183; Fuentes II ¶ 160.

[1607] *See* Resp's C-M ¶ 422 (arguing merely that "[t]he Constitutional Court's substantive decisions are outside the purview of the Tribunal").

[1608] Resp's C-M, heading before ¶ 428.

[1609] *See* Resp's C-M ¶¶ 428-430.

[1610] *Id.* ¶ 430.

[1611] Fuentes II ¶ 73; Constitutional Court of Guatemala, Case No. 3878-2007, Decision dated 21 Dec. 2009, at 36 (C-0497). Elsewhere, Guatemala refers to the Constitutional Court's decision in Case No. 3580-2015, asserting that the Court in that case "imposed the suspension of the license until consultations were held with the affected communities." Resp's C-M ¶ 416 (citing Constitutional Court of Guatemala, Case No. 3580-2015, Decision dated 6 Feb. 2017, at 11 (R-0120)). This is misleadingly inaccurate because, as Guatemala fails to mention, this case was based on a (false) claim that Exmingua conducted construction works without a *construction permit* and did not involve Exmingua's exploitation license, which at

532. Here, as demonstrated above and in Claimants' Memorial, the Guatemalan court decisions ordering and upholding the suspension of Exmingua's operations over more than five years and without any end in sight have had the direct effect of depriving Exmingua of its vested rights under its lawfully obtained exploitation license, in contravention of the Guatemalan constitutional principles of legitimate confidence, legal certainty, equality before the law, and due process of law, as well as the right to property and the freedom of trade and industry.[1612] This deprivation by the Guatemalan courts was not only contrary to Guatemalan law, but also violated principles of international law that protect vested rights and limit the retroactive application of new laws or retroactive re-interpretations of existing laws.

533. As stated recently by the tribunal in *Cairn Energy v. India*, "[t]he principle of legal certainty is widely recognised as a fundamental component of the rule of law which, in turn, has long been recognised by international law."[1613] Referring to judgments of the International Court of Justice, the *Cairn Energy* tribunal further found that "[t]he use of 'rule of law' as a foundational concept in these judgments has in turn been reflected in investment treaty jurisprudence."[1614] Examining various other sources, the tribunal concluded that "the manifestations of the foundational concept of the rule of law such as the principle of legal certainty qualify as 'general principles of law recognized by civilized nations' for purposes of Article 38.1(c) of the ICJ Statute, and may thus guide the Tribunal in determining the content of the FET standard contained in an international treaty, irrespective of the background or political stance of the Contracting States."[1615] As a general principle of law, the principle of legal certainty also should guide this Tribunal in determining Guatemala's obligation not to deny justice under DR-CAFTA Article 10.5(1).

534. As regards the principle of non-retroactivity, the *Cairn Energy* tribunal found that it is "one of the essential elements of the principle of legal certainty," and conversely that, generally, "the retroactive application of legislation constitutes a fundamental affront to the principle of legal

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that time already had been suspended; and the suspension ordered was not of any license or permit, but rather of construction works that already had been completed. *See supra*, § II.C.1.

[1612] *See supra*, § II.D.1.b; Clms' Mem. ¶¶ 140, 296-305; Fuentes I ¶¶ 163-184; *see also* Fuentes II ¶¶ 160-162.

[1613] *Cairn Energy Plc and Cairn UK Holdings Ltd. v. The Republic of India*, UNCITRAL, PCA Case No. 2016-7, Award dated 21 Dec. 2020 ¶ 1741 (CL-0335) (citing *Asylum Case (Colombia v. Peru)*, Judgment, 1950 I.C.J. Rep. 284; *Case concerning Elettronica Sicula, S.p.A. (ELSI) (United States v. Italy)*, 1989 I.C.J. Rep. 15 ¶ 128).

[1614] *Cairn Energy Plc and Cairn UK Holdings Ltd. v. The Republic of India*, UNCITRAL, PCA Case No. 2016-7, Award dated 21 Dec. 2020 ¶ 1741 (CL-0335) (citing *Chevron Corp. and Texaco Petroleum Corp. v. The Republic of Ecuador (II)*, PCA Case No.2009-23, Second Partial Award on Track II dated 30 Aug. 2018 ¶¶ 9.16-9.19; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability dated 14 Jan. 2010 ¶¶ 262-263; *Glencore Int'l A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award dated 27 Aug. 2019 ¶¶ 1446, 1450).

[1615] *Cairn Energy Plc and Cairn UK Holdings Ltd. v. The Republic of India*, UNCITRAL, PCA Case No. 2016-7, Award dated 21 Dec. 2020 ¶ 1749 (CL-0335).

certainty and runs afoul of the guarantee of predictability of the legal environment."[1616] In *Bilcon v. Canada*, the tribunal observed that retroactivity might amount to a breach of the MST.[1617] And, as Professor Paulsson explains in his monograph, for the same reasons, new "judge-made" or "decisional" law may amount to a denial of justice.[1618]

535. In applying the principle of non-retroactivity, the *Cairn Energy* tribunal found that it "should . . . be balanced against the State's power to act in pursuance of the public purpose," explaining that "certain types of retroactive regulations might be justified when the State has a particular purpose that justifies that particular form of retroactivity."[1619] Further, when balancing the State's particular purpose and the investor's interests, the *Cairn Energy* tribunal found that the principle of proportionality should be applied, as "the measures should not be more burdensome for the individual's rights and interests than required by the pursued public purpose, especially if a less burdensome measure would be available to satisfy the same public purpose."[1620] In this regard, the *Cairn Energy* tribunal emphasized that it is necessary to "determine whether the departure from the principle of legal certainty is justified by an additional public purpose that cannot be met without the measure being given retroactive effect."[1621]

536. In reaching their decisions to suspend Exmingua's operations, the Guatemalan courts did not even engage in balancing the State's interest in conducting consultations under ILO Convention 169 and Exmingua's vested right to operate under its exploitation license. Nor did the courts conduct a proportionality analysis to determine whether it was necessary or adequate to suspend Exmingua's

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[1616] *Cairn Energy Plc and Cairn UK Holdings Ltd. v. The Republic of India*, UNCITRAL, PCA Case No. 2016-7, Award dated 21 Dec. 2020 ¶ 1757 (CL-0335) ("[O]ne of the essential elements of the principle of legal certainty is precisely that '[p]eople must be informed in advance of the consequences of their behaviour' and that laws should 'enable legal subjects to regulate their conduct in conformity with it.' For this reason, the rule is that the law operates prospectively. By their very nature, retroactive laws do not allow individuals to predict the legal consequences of their conduct. An individual that is subjected to retroactive legislation is thus deprived of the ability to make an informed choice and plan his/her activities in consideration of the legal consequences of his/her conduct, for the simple reason that it is impossible to alter events or actions that have already occurred. Thus, in accordance with the principle of legal certainty, the general rule in a system governed by the rule of law is that the law applies prospectively. Subject to exceptions where this is justified by a specific public purpose . . . , the retroactive application of legislation constitutes a fundamental affront to the principle of legal certainty and runs afoul of the guarantee of predictability of the legal environment.") (quoting The Rule of Law Checklist of the Venice Commission, adopted by the Venice Commission at its 106th Session, 11-12 Mar. 2016 ¶¶ 58, 62)).

[1617] *William Ralph Clayton and others v. Government of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 Mar. 2015 ¶ 572 (CL-0088) ("[B]reaches of the international minimum standard might arise in some special circumstances—such as changes in a legal or policy framework that have retroactive effect, are not proceeded by reasonable notice, are aimed or applied in a discriminatory basis or are contrary to earlier specific assurances by state authorities that the regulatory framework would not be altered to the detriment of the investor.").

[1618] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW, at 199-200 (2005) (CL-0171).

[1619] *Cairn Energy Plc and Cairn UK Holdings Ltd. v. The Republic of India*, UNCITRAL, PCA Case No. 2016-7, Award dated 21 Dec. 2020 ¶ 1788 (CL-0335).

[1620] *Id.* (internal citations omitted).

[1621] *Id.* ¶ 1794.

operations in order to conduct the consultations. Instead, the courts placed on Exmingua the entire burden of the State's purported failure to perform its own obligation to conduct the consultations, in gross violation of the principle of proportionality and for reasons that can only be explained as unduly political.[1622] The courts also did so retroactively, by requiring a new consultation process, indefinitely suspending Exmingua's previously-granted exploitation license, and imposing new conditions on its reactivation. As in *Cairn Energy*, Guatemala's retroactive imposition of new conditions on Exmingua's ability to operate under its pre-existing exploitation license "failed to balance, or at least adequately to balance, the Claimants' protected interest of legal certainty / stability / predictability on the one hand, and the Respondent's power to regulate in the public interest on the other."[1623] Also as in *Cairn Energy*, "this unjustified retroactivity is 'not so much something opposed to a rule of law, as something opposed to the rule of law,' and 'shocks, or at least surprises, a sense of juridical propriety.'"[1624]

537. The Guatemalan courts' requirement of a new consultation process, indefinite suspension of Exmingua's previously-granted exploitation license, and imposition of new conditions on its reactivation also was arbitrary. In *Bilcon v. Canada*, the tribunal found that "the conduct of the [State's] joint review was arbitrary [because it] effectively created, without legal authority or fair notice to Bilcon, a new standard of assessment rather than fully carrying out the mandate [for granting a mining license] defined by the applicable law."[1625] Here, the Guatemalan courts' suspension of Exmingua's exploitation license was contrary to Guatemala's legal framework and prior authorizations and representations, and was further to the retroactive application of a novel consultation requirement. As in *Bilcon*, the creation of new requirements and the suspension based on such new requirements was arbitrary.

538. The Guatemalan courts also denied justice because they unjustifiably penalized Exmingua for the State's own failure to conduct consultations under ILO Convention 169. None of the court decisions refers to any wrongdoing by Exmingua in this regard. Indeed, Exmingua met all requirements under Guatemala's applicable laws and regulations in order to obtain its exploitation

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[1622] *See* Transcript of Interview by Canal Antigua with Roberto Molina Barreto, President of the Constitutional Court, dated 15 Apr. 2021, (Minute 15.05) (C-0901) (criticizing the Constitutional Court's contradictory rulings concerning the right to consultations under ILO Convention 169 as "being politicized because the one who is obliged to consult is the State through the competent bodies" and as "caus[ing] legal uncertainty"); *see also supra* § II.D.4.

[1623] *Cairn Energy Plc and Cairn UK Holdings Ltd. v. The Republic of India*, UNCITRAL, PCA Case No. 2016-7, Award dated 21 Dec. 2020 ¶ 1816 (CL-0335).

[1624] *Id.* ¶ 1816 (quoting *Case concerning Elettronica Sicula, S.p.A. (ELSI) (United States v. Italy)*, 1989 I.C.J. Rep. 15 ¶ 128).

[1625] *William Ralph Clayton and others v. Government of Canada*, NAFTA, PCA Case No. 2009-4, Award on Jurisdiction and Liability dated 17 Mar. 2015 ¶ 591 (CL-0088).

license, and that license was validly granted under Guatemalan law. The Constitutional Court itself, over more than a decade, reiterated that the fault for the failure to conduct consultations under ILO Convention 169 lay entirely with the State, primarily the Legislature for failing to enact legislation to implement ILO Convention 169 into Guatemalan law by providing authority and guidance to the MEM to lead consultations. Yet, in Exmingua's case, the Constitutional Court sanctioned Exmingua by depriving it of its vested rights, while neither the Legislature nor the MEM (nor the MARN) has suffered any sanction.

539. Finally, the Guatemalan courts' decisions were discriminatory in that they ordered the suspension of Exmingua's operations, purportedly to allow consultations to proceed, while at the same time allowing other operators, in particular Oxec and Minera San Rafael, to continue operations during the conduct of consultations, even upon Exmingua seeking reconsideration.[1626] Guatemala even concedes that it has been treating Oxec and other hydroelectric projects preferentially over mining projects in this regard, but it fails to explain how the conduct of consultations requires suspension in the latter cases, but not the former, and the courts' decisions do not address this issue either.[1627]

540. To the extent Guatemala attempts to defend its courts' procedural due process violations in allowing CALAS to file its action out of time, without having exhausted available administrative remedies, without standing to sue, and against an improper defendant,[1628] Guatemala merely argues in a conclusory fashion that its courts complied with Guatemalan law.[1629] In doing so, Guatemala fails to convincingly rebut the conclusions of Professor Fuentes to the contrary and, in any event, ignores that, even if its courts complied with Guatemalan law (which they did not), that alone would not be sufficient to defeat a claim under the Treaty for denial of justice.[1630]

[1626] *See supra* § II.D.1.c; *see also* Constitutional Court of Guatemala, Consolidated Cases Nos. 90-2017, 91-2017 and 92-2017, Decision dated 26 May 2017, at 101 [at 4 ENG] (C-0441) (ordering the MEM to conduct consultations under ILO Convention 169 within 12 months, and allowing the operations of Oxec and Oxec II to continue during that period of time); Supreme Court of Guatemala, Case No. 1076-2017, Decision dated 8 Sept. 2017, at 65 [at 1 ENG] (C-0570) (ordering the MEM to conduct consultations within 12 months and permitting Minera San Rafael to continue operations during the consultation period).

[1627] *See supra* § II.D.1.c; *see also* Resp's C-M ¶ 137.

[1628] *See supra*, § II.D.1.a; *see also* Clms' Mem. ¶¶ 75-77, 137, 281-288, 290-291; Fuentes I ¶¶ 110-136, 143-152; Fuentes II ¶¶ 114-145, 146, 151-155.

[1629] *See* Resp's C-M ¶¶ 424-430.

[1630] *See Loewen Group, Inc. and Raymond L. Loewen v United States of America*, ICSID Case No. ARB (AF)/98/3, Award dated 26 June 2003 ¶ 133-134 (CL-0170) ("In the words of the NAFTA Tribunal in [*Mondev*], 'the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to 'unfair and inequitable treatment'.' If that question be answered in the affirmative, then a

541. As regards CALAS's standing to sue, Guatemala' expert, Professor Richter, essentially admits that Guatamala's courts changed the law in Exmingua's case in order to allow CALAS to pursue its *amparo* action, by way of an "innovation," "broadening the capacity to request [an *amparo*] without expressly providing evidence of a personal and direct grievance or, as the case may be, that the person appearing does so in legal representation of a community or is entrusted with the defense of diffuse rights…."[1631] Without that "innovation," CALAS would have been denied standing, and its case would have been dismissed.[1632] As Professor Paulsson states in his monograph with respect to the circumstances in which new "judge-made" or "decisional" law amounts to a denial of justice, "[s]urprising departures from settled patterns of reasoning or outcomes, or the sudden emergence of a full-blown rule where none had existed, must be viewed with the greatest scepticism if their effect is to disadvantage a foreigner. If it is targeted, 'decisional law' is no different from statutes or decrees, and may constitute an international wrong."[1633]

542. In the *amparo* proceedings, the Guatemalan courts similarly deviated for the first time, and without any legal basis, from other mandatory admissibility requirements under the *Amparo* Law in order to allow CALAS's *amparo* action to proceed, even though CALAS filed it out of time, failed to exhaust available administrative remedies, and named the wrong respondent.[1634] Guatemala fails to engage with the detailed explanations provided by Claimants and Professor Fuentes in this regard, except to state in a conclusory manner that "CALAS's *amparo* action was filed in accordance with Guatemalan law," and disingenuously supports that statement solely with the very court decision that is at issue here.[1635]

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breach of Article 1105 is established. Whether the conduct of the trial amounted to a breach of municipal law as well as international law is not for us to determine.") (quoting *Mondev Int'l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award dated 11 Oct. 2002 ¶ 127 (RL-0018)); *see also* International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, U.N. General Assembly Resolution 56/83 (12 Dec. 2001), UN Doc. A/RES/56/83, Annex, Art. 3 (RL-0291) ("The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.").

[1631] Richter ¶ 90; Resp's C-M ¶¶ 124, 427.

[1632] *See* Fuentes I ¶¶ 134-142; Fuentes II ¶¶ 146-150 [= all of § III.A.3.c]; *see also supra*, § II.D.1.a.iv.

[1633] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW, at 199-200 (2005) (CL-0171).

[1634] *See supra* § II.D.1.a.ii (disregard of the Amparo Law's mandatory timeliness requirement); *id.* § II.D.1.a.iii (disregard of the Amparo Law's mandatory exhaustion-of-remedies requirement); *id.* § II.D.1.a.v (disregard of the MEM's lack of standing to be sued).

[1635] Resp's C-M ¶ 424-427 (citing Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision dated 11 June 2016 (C-0145)). Guatemala's footnote references in these paragraphs all refer to this same decision, although they are falsely made to appear to refer to different decisions of both the Constitutional Court and the Supreme Court, rendered on different dates and contained in different exhibits. *Id.*, n. 719-721.

543. Regarding the Supreme Court's violation of Exmingua's right to be heard, Guatamala argues that "the Amparo Law allows *ex parte* provisional amparos," and that "Exminga was not prejudiced as a result of joining the proceedings after the issuance of the provisional amparo."[1636] Guatemala ignores that the *Amparo* Law specifically obligates the court to notify interested third parties on the day following receipt of the report of the challenged authority (here: the MEM), and to hear such third parties within 48 hours thereafter, as explained by Professor Fuentes.[1637] In the instant case, the MEM filed its report on 5 September 2014, and the Supreme Court thus should have notified Exmingua the next day. Had Exmingua been timely notified, it would have seen that CALAS's *amparo* request expressly requested the Supreme Court to order the provisional (and final) suspension of Exmingua's exploitation license,[1638] and would have had the opportunity to respond to that request before the Court issued its *amparo provisional* on 11 November 2015.[1639]

544. Guatemala further argues that Exmingua did not seek rectification of this violation of its right to be heard by objecting to the Supreme Court or in its appeal to the Constitutional Court.[1640] As Guatemala admits, however, Exmingua "challenged the *amparo provisional* with much force… based on the same argument the Claimants present to this Tribunal."[1641] Exmingua did so immediately upon notification of the court papers by filing a direct appeal to the Constitutional Court, as first objecting to the Supreme Court, *i.e.*, the very court that for 18 months had ignored Exmingua's right to be heard, would have been futile.[1642] Guatemala, however, conveniently omits mentioning that the Constitutional Court, in its 5 May 2016 decision rejecting Exmingua's appeal, simply found that "the conditions warranting the grant of the interim protection requested are met," without addressing any of the blatant violations of Exmingua's due process rights that formed the basis of Exmingua's appeal.[1643]

545. Guatemala's attempt to defend the Constitutional Court's four-year delay in issuing its decision[1644] also fails.[1645]

[1636] Resp's C-M ¶ 406.

[1637] Fuentes I ¶ 94; *Amparo* Law, Arts. 5, 34, 35 (C-0416).

[1638] CALAS's *Amparo* Petition dated 28 Aug. 2014, at 18-21 [at 11-13 ENG] (C-0137).

[1639] *See* Supreme Court of Guatemala, Case No. 1592-2014, Decision dated 11 Nov. 2015 (C-0004).

[1640] Resp's C-M ¶ 409.

[1641] *Id.* ¶ 408.

[1642] Exmingua's Direct Appeal to the Constitutional Court dated 23 Feb. 2016 (C-0005); Supreme Court of Guatemala, Case No. 1592-2014, Notification to Exmingua dated 19 Feb. 2016 (C-0470).

[1643] Constitutional Court of Guatemala, Consolidated Cases Nos. 795-2016 and 1380-2016, Decision dated 5 May 2016, at 4 [at 2 ENG] (C-0143); *see also* Fuentes I ¶ 97.

[1644] Resp's C-M ¶¶ 410-417.

546. Guatemala characterizes as an "outlier" the *Pey Casado v. Chile* award, which found a seven-year delay to constitute a denial of justice.[1646] Guatemala's criticism of that award for a lack of guidance or reasoning is misplaced given that the award's reasoning is clear: on the basis of the facts found by the tribunal and described earlier in the award, the tribunal found the failure of a Chilean court to rule for more than seven years on the merits of a claim to constitute a denial of justice.[1647] The award also relied on several legal authorities, including the following quote from Professor Paulsson's monograph: "[D]elays may be 'even more ruinous' than absolute refusal of access [to justice], because in the latter situation the claimant knows where he stands and takes action accordingly, whether by seeking diplomatic intervention or exploring avenues of direct legal action."[1648] As for "the complexity of the matter, the interests at stake, and the effects of the delay,"[1649] which Guatemala apparently has difficulty in divining, the award clearly states that the object whose restitution or compensation was in dispute before the Chilean court, was a printing press.[1650] While the award does not state the value of the press, it is safe to assume that it was significantly less than the value of Claimants' investment in the instant Arbitration.

547. In addressing other decisions of international tribunals relating to the length of time that should be considered excessive, Guatemala conveniently ignores the distinct consequence of the delay in the instant case, namely the continued suspension of Exmingua's operations, which by now has exceeded five years.[1651] Guatemala, of course, is aware of this, falsely asserting that "Claimants have not shown how they have suffered harm as a result to [*sic*] the delay."[1652] As Professor Douglas states, "people have a right to a 'consistent weighting of the importance of moral harm' in an adjudicative procedure."[1653] By ordering the suspension of Exmingua's operations, purportedly in order to facilitate ILO consultations; directing that consultations be conducted for other projects without ordering their suspension; refusing to lift the suspension when such consultations clearly were

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[1645] *See supra*, § II.D.1.a.vi.

[1646] Resp's C-M ¶ 295; *Victor Pey Casado and Salvador Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/9/2, Award dated 8 May 2008 ¶ 659 (CL-0177).

[1647] *Victor Pey Casado and Salvador Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/9/2, Award dated 8 May 2008 ¶ 659 (CL-0177); *see also Id.* ¶¶ 77-80 (setting out the relevant facts).

[1648] *Id.* ¶ 660 (quoting JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 177 (2005)).

[1649] Resp's C-M ¶ 295 (quoting *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (May 8, 2008), ¶ 659 (CL-0177), although the cited paragraph is not contained in the referenced exhibit).

[1650] *See Victor Pey Casado and Salvador Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/9/2, Award dated 8 May 2008 ¶ 78 (CL-0177).

[1651] *See* Resp's C-M ¶¶ 290-299.

[1652] *Id.* ¶ 417; *see also* Clms' Mem., § IV; *infra* § IV.

[1653] Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63 INT'L & COMP. L.Q 867, 890 (2014) (RL-0191).

not occurring over many years; delaying notification to the MARN of its 11 June 2020 for several months in order to render ineffective the 24-hour deadline for filing requests for clarification, and then refusing to rule on the request made more than nine months ago, in blatant violation of the 48-hour deadline to do so, thus providing the MEM with a contrived excuse that it need not commence consultations because the Court's decision is not yet "final," Guatemala's highest courts manifestly and egregiously failed in conducting any kind of "weighting of the importance of moral harm." Instead, they arbitrarily denied Exmingua its vested property rights on account of Guatemala's own failure to purportedly implement and apply its laws.

F. Guatemala Failed to Accord Claimants And Their Investment National And Most-Favored-Nation Treatment

548. As Claimants established in their Memorial, under DR-CAFTA Articles 10.3 and 10.4, Guatemala agreed to accord to Claimants and their investments NT and MFN treatment.[1654] Guatemala breached both of these Treaty obligations when its courts and the MEM treated Exmingua less favorably than Oxec, which, to Claimants' knowledge and belief, is directly/legally- owned by a Panamanian investor and indirectly/beneficially-owned by a Guatemalan investor, as well as Minera San Rafael and CGN, which are owned, respectively, by Canadian and Swiss investors.[1655]

549. As noted, while Guatemala agrees that Oxec is Guatemalan-owned,[1656] Claimants have now ascertained that the direct owner of the two Guatemalan Oxec companies is a Panamanian company, Energy Resources Capital Corp.[1657] Accordingly, Claimants maintain their NT claim using Oxec as a comparator based on its indirect/beneficial Guatemalan ownership and, in the alternative, expand their MFN claim to Oxec based on its direct/legal Panamanian ownership.

550. In its Counter-Memorial, Guatemala makes arguments relating to the NT and MFN standard under DR-CAFTA Articles 10.3 and 10.4, as well as relating to the application of those standards. As shown below, those arguments must fail.

[1654] Clms' Mem. ¶¶ 314-322.

[1655] *Id.* ¶¶ 323-328.

[1656] Resp's C-M, n. 419 (acknowledging and not challenging Claimants' assertion that Oxec has Guatemalan, indirect ownership).

[1657] *See supra* § III.A.3; Dun & Bradstreet report dated 13 Apr. 2021 (C-0990).

1. The DR-CAFTA Obliges States To Accord NT And MFN Treatment To Investors And Investments In Like Circumstances

551. In their Memorial, Claimants established that Articles 10.3 and 10.4 of the DR-CAFTA oblige Guatemala to accord to investors and investments of the other contracting Parties "treatment no less favorable than that it accords, in like circumstances," to its own investors and investments, as well as to investors and investments of third-States.[1658] Claimants further demonstrated that tribunals applying the NAFTA, whose NT and MFN standards are formulated identically to those of the DR-CAFTA,[1659] interpret the phrase "in like circumstances" as requiring the investor to be either (i) in the same economic or business sector as another investor;[1660] or (ii) subject to a similar regulatory process, such as an environmental assessment, even when their circumstances and the nature of their businesses are not identical to one another.[1661] Where an investor or investment satisfies this "in like circumstances" requirement and receives less favorable treatment, the State will have violated its treaty obligation regardless of whether the State intended to discriminate against the investor or investment.[1662]

552. Guatemala disputes Claimants' formulation of the NT and MFN standards under Articles 10.3 and 10.4, arguing that these they require an investor to prove, or at least suggest, the existence of the State's nationality-based discriminatory intent.[1663] Additionally, Guatemala asserts that, in the absence of denial of justice, domestic court judgments cannot amount to a breach of the NT and MFN standards.[1664] Guatemala's assertions are wrong.

553. *First*, Guatemala's contention that the DR-CAFTA's NT and MFN provisions require Claimants to prove the State's discriminatory intent has no basis in the text of the Treaty, as

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[1658] Clms' Mem. ¶ 314; DR-CAFTA, Arts. 10.3, 10.4 (CL-0001).

[1659] NAFTA, Arts. 1102, 1103 (CL-0034).

[1660] Clms' Mem. ¶ 315; *S.D. Myers, Inc. v. Government of Canada*, NAFTA, UNCITRAL, Partial Award dated 13 Nov. 2000 ¶¶ 243, 250-251 (CL-0104); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/99/1, Award dated 16 Dec. 2002 ¶ 171 (CL-0093); *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/04/5, Award dated 21 Nov. 2007 ¶¶ 201-202 (CL-0195); *Corn Prods. Int'l Inc. v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility dated 15 Jan. 2008 ¶ 120 (CL-0196); *Cargill, Inc. v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/05/2, Award dated 18 Sept. 2009 ¶¶ 211-214 (CL-0197).

[1661] Clms' Mem. ¶ 316; *William Ralph Clayton and others v. Government of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 Mar. 2015 ¶¶ 692-705 (CL-0088).

[1662] Clms' Mem. ¶¶ 317; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award dated 6 Feb. 2007 ¶ 321 (CL-0159).

[1663] Resp's C-M ¶¶ 622, 659-665.

[1664] Resp's C-M ¶¶ 618-620.

Guatemala appears to acknowledge.[1665] Unperturbed by the lack of any express requirement, Guatemala asserts that such a requirement arises when Articles 10.3 and 10.4 are interpreted in accordance with their ordinary meaning and in light of their object and purpose.[1666] However, it fails to provide any further explanation for its analysis of Articles 10.3 and 10.4 or otherwise particularize it.

554. Guatemala's assertion also is undermined by the United States' NDP submission, which notes that, in order to establish a breach of Article 10.3, investors need only prove that they or their investments "(1) were accorded 'treatment'; (2) were in 'like circumstances' with domestic investors or investments; and (3) received treatment 'less favorable' than that accorded to domestic investors or investments."[1667] The United States' NDP further notes that "[e]stablishing a violation of Article 10.4 is the same as establishing a violation of Article 10.3, except that the applicable comparator in step two above is an investor or investments of a third State."[1668]

555. Indeed, this Tribunal has already rejected Guatemala's attempt to read non-existent language into the text of the Treaty, in its Decision on Preliminary Objections, in which the Tribunal found that it must interpret the text of the DR-CAFTA "rather than ascribing to the State Parties particular intentions which (however potentially sound from a policy perspective) are not revealed through recognized VCLT analysis."[1669]

556. Guatemala further asserts that the requirement to prove discriminatory intent is supported by the "unanimous" practice of investment arbitration tribunals.[1670] Contrary to Guatemala's assertion, there is no "unanimous" support for the existence of this requirement. Many arbitration tribunals, including *Feldman v. Mexico*, cited by Guatemala, have held that the requirement to prove discriminatory *intent* would be insurmountably burdensome for investors, and that the *impact* of the State's measures should be determinative for proving the existence of nationality-based discrimination.[1671] This is supported by other cases, also cited by Guatemala, which did not find that

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[1665] *See* Resp's C-M ¶ 621 (stating that the "three elements" are (i) "a certain treatment," (ii) "comparators . . . in like circumstances," and (iii) less favorable treatment); *see also id.* ¶ 660 (introducing discriminatory "intent" for the first time); *see also* DR-CAFTA, Arts. 10.3, 10.4 (CL-0001).

[1666] Resp's C-M ¶ 622.

[1667] U.S. NDP Sub. ¶ 31.

[1668] *Id.* ¶ 32.

[1669] Decision on Respondent's Preliminary Objections dated 13 Mar. 2020, at 157.

[1670] Resp's C-M ¶ 622.

[1671] *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award dated 16 Dec. 2002 ¶ 183 (CL-0093) ("[R]equiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government. It would be virtually impossible for any claimant

it was necessary to prove discriminatory intent, but instead based their decisions on finding (i) differential treatment of all companies from a particular jurisdiction,[1672] or (ii) the claimants' failure to identify any comparable companies.[1673] Even tribunals that have considered the motives behind the State's actions have noted that the existence of intent was secondary to the discriminatory impact of the State's treatment. For instance, the NAFTA tribunal in *S.D. Myers v. Canada* noted that discriminatory intent was "*important, but . . . not necessarily decisive*" for finding discrimination, considering it as a factor, rather than a prerequisite.[1674]

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to meet the burden of demonstrating that a government's motivation for discrimination is nationality rather than some other reason"); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award dated 6 Feb. 2007 ¶ 321 (CL-0159) ("The Tribunal concurs that intent is not decisive or essential for a finding of discrimination, and that the impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment."); *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 Nov. 2015 ¶ 7.152 (RL-0253) ("[T]he Tribunal considers that discriminatory effects of the measures are sufficient to breach the prohibition"); *Occidental Exploration & Prod. Co. v. Ecuador*, LCIA Case No. UN3467, Final Award dated 1 July 2004 ¶ 177 (CL-0200) ("In the present dispute the fact is that OEPC has received treatment less favorable than that accorded to national companies. The Tribunal is convinced that this has not been done with the intent of discriminating against foreign-owned companies. . . . However, the result of the policy enacted and the interpretation followed by the SRI in fact has been a less favorable treatment of OEPC."); *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018 ¶ 1206 (CL-0364) ("[T]he BIT requires an objective analysis of the identified treatment, and a determination of whether it is less favourable. It follows from the factual findings on 'like circumstances' that the Tribunal need not further consider what is required to establish a breach of Article 3(1). Without deciding the matter, the Tribunal has proceeded on the basis that considerations of 'justification' or 'sectional or racial prejudice' are not required to establish a breach of Article 3(1)"); *Standard Chartered Bank (Hong Kong) Ltd. v. United Republic of Tanzania II*, ICSID Case No. ARB/15/41, Award of the Tribunal, 11 Oct. 2019 ¶ 408 (CL-0278) ("The Tribunal takes the view that Article 16.1 of the Implementation Agreement does not support a requirement of intent; what is addressed is the discriminatory action and its consequences. Intent is a distinct element and one that is burdensome to prove and should not be readily implied since it would reduce the scope of protection without explicit mention."); *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability dated 10 Apr. 2013 ¶ 886 (CL-0365) ("[T]he Tribunal does not agree that discriminatory measures require an intent to harm the investor in question. Such a requirement appears nowhere in the text of the BIT, and the case law interpreting the BIT does not support such a requirement[]") (citing *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Award dated 6 Feb. 2007 ¶ 321; *LG&E Energy Corp and others v. Argentine Republic*, ICSID Case No ARB/02/1, Award dated 25 July 2007 ¶ 146; *El Paso Energy Int'l v. Argentine Republic*, ICSID Case No ARB/03/15, Award dated 31 Oct. 2011 ¶ 305).

[1672] *Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award 18 Sept. 2009 ¶ 220 (CL-0197) ("The IEPS Tax was taken avowedly to bring pressure on the United States government. By its very design, then, it was directed at United States producers of HFCS because only in that way would pressure be brought to bear on the United States government.")

[1673] *The Loewen Group Inc.* et al*. v. United States*, ICSID Case No. ARB(AF)/98/3, Award dated 26 June 2003 ¶ 140 (CL-0170) ("What Article 1102(3) requires is a comparison between the standard of treatment accorded to a claimant and the most favourable standard of treatment accorded to a person in like situation to that claimant. There are no materials before us which enable such a comparison to be made."); *Mercer Int'l Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award dated 6 Mar. 2018 ¶ 7.45 (RL-0247) ("[D]ifferent treatment is not proven to be 'discriminatory treatment' in violation of NAFTA Articles 1102 or 1103. Whilst ostensibly comparators, none were 'in like circumstances' for the purposes of NAFTA Articles 1102 and 1103; and their different treatment can best be explained on the basis of their individual circumstances").

[1674] *S.D. Myers, Inc. v. Government of Canada*, NAFTA, UNCITRAL, Partial Award dated 13 Nov. 2000 ¶ 254 (CL-0104) (further noting that "[t]he existence of an intent to favour nationals over non-nationals would not give rise to a breach of Chapter 1102 of the NAFTA if the measure in question were to produce[] no adverse effect on the non-national complainant. The word 'treatment' suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11.").

557. Accordingly, neither the Treaty's language nor jurisprudence requires a showing of discriminatory intent in order to demonstrate an NT or MFN violation.

558. *Second*, Guatemala's assertion that, in the absence of a denial of justice, a domestic court judgment cannot violate the DR-CAFTA's NT and MFN protections, is incorrect.[1675] As Claimants have demonstrated above, acts of any State organ, including the judiciary, are attributable to the State and may give rise to State responsibility, outside of a denial of justice.[1676]

559. Indeed, in the absence of any legal authority supporting its position, Guatemala relies on the United States' counter-memorial in *Loewen v. United States*.[1677] As Guatemala acknowledges, the *Loewen* tribunal never reached the issue, as it dismissed the claims on other grounds.[1678] While the United States' NDP submission in this Arbitration states that, "absent a denial of justice involving discriminatory treatment by the courts or access to judicial remedies, judicial measures do not violate Articles 10.3 or 10.4 of the CAFTA-DR,"[1679] its interpretation is not supported by the other NDP submissions in this Arbitration, which are silent on this issue.[1680]

2. Guatemala Breached Its Treaty Obligation To Accord Claimants And Their Investments NT and MFN

560. Having established the content of Articles 10.3 and 10.4 of the DR-CAFTA, Claimants demonstrated in their Memorial that Exmingua was in like circumstance with Oxec, San Rafael, and CGN because each of these companies (i) operated in Guatemala; (ii) was subject to a similar environmental regulatory regime; (iii) faced *amparo* proceedings challenging its license based on the State's failure to comply with its obligations under ILO Convention 169; and (iv) except for Oxec, was subjected to the suspension of its license based on the Guatemalan courts' finding that the State had failed to comply with its obligation to conduct consultations under ILO Convention 169.[1681]

561. Claimants further demonstrated that Guatemala breached its Treaty obligations to accord Claimants' investments NT and MFN treatment when (i) the Guatemalan Constitutional Court suspended Exmingua' operations, while allowing Oxec to continue operating while the MEM

[1675] *See* Resp's C-M ¶¶ 618-620.
[1676] *See supra* § III.B.
[1677] Resp's C-M ¶ 619.
[1678] *Id.*
[1679] U.S. NDP Sub. ¶ 34.
[1680] *See* El Salvador NDP Sub.; Costa Rica NDP Sub.; Dominican Republic NDP Sub.
[1681] Clms' Mem. ¶ 323.

conducted consultations;[1682] (ii) Guatemala's courts imposed an additional uncertain condition on Exmingua – that was not imposed on any other comparable project – before its operations could resume;[1683] (iii) Guatemala's courts delayed the proceedings relating to Exmingua's exploitation license for six years, while deciding the same issues with respect to licenses held by investments of domestic and third-State investors in less than half that time;[1684] and (iv) the MEM began and completed consultations for Oxec over a timeframe of just a few months, whereas it has refused even to commence consultations for Exmingua.[1685]

562. In its Counter-Memorial, Guatemala contends that Exmingua was not in like circumstances with Oxec,[1686] Minera San Rafael, or CGN.[1687] Guatemala also argues that Exmingua, in any event, was not treated differently from these companies by the Guatemalan courts or the MEM.[1688] Guatemala further asserts that Claimants failed to particularize their MFN claim,[1689] and argues that none of the acts complained of by Claimants amounts to a breach of NT or MFN treatment because there is no evidence of nationality-based discrimination against Claimants.[1690]

a. Claimants And Exmingua Are In Like Circumstances With Oxec, Minera San Rafael And CGN, And Their Investors

i. Exmingua And Oxec Are In Like Circumstances Because They Were Subject To Similar Environmental Regulatory Regimes

563. Guatemala asserts that Claimants and Exmingua are not in like circumstances with Oxec and its domestic investors, because Exmingua and Oxec are neither operating in the same business sector nor within the same regulatory framework, as Oxec is operating hydroelectric projects and Exmingua was operating a mining project.[1691] This is incorrect as a matter of fact and law.

564. In their Memorial, Claimants established that investments can be considered "in like circumstances" when the companies operate within the same economic or business sector, as well as when the companies are subject to a similar regulatory process, such as an environmental assessment,

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[1682] *Id.* ¶ 325.
[1683] *Id.* ¶ 326.
[1684] *Id.* ¶ 327.
[1685] *Id.*
[1686] Resp's C-M ¶¶ 624-630.
[1687] *Id.* ¶¶ 642-645.
[1688] *Id.* ¶¶ 637-641, 646-650.
[1689] *Id.* ¶¶ 617, 656-658.
[1690] *Id.* ¶¶ 622, 659 – 665.
[1691] *Id.* ¶¶ 624-630.

even when their circumstances and the nature of their businesses are not identical to one another.[1692] Both Exmingua and Oxec operate in Guatemala and are subject to a similar environmental regulatory regime, which requires them to complete and have approved an EIA for their respective projects.[1693] For the purposes of the measures here, namely (i) the courts' actions in the *amparo* proceedings; and (ii) the MEM's actions in regard to the court orders directing it to conduct consultations, Exmingua and Oxec are in like circumstances. Any distinctions between the industries in which Exmingua and Oxec operate are irrelevant for these purposes, as are Guatemala's remarks as to whether the production of minerals is a "public good" or energy production is a matter of "national urgency."[1694]

565. Contrary to Guatemala's assertions that "such a broad and sweeping category of comparators has never been applied in the national treatment or MFN context,"[1695] this comparison is in line with the practice of investment tribunals. Although Guatemala remarks that the *Clayton v. Canada* tribunal compared the claimant's project to two quarry and marine terminal projects and one harbor project,[1696] the tribunal agreed in principle with the claimant's position that it was in like circumstances with *all* enterprises affected by the environmental assessment regulatory process.[1697] Similarly, in *Occidental v. Ecuador*, the tribunal decided that an oil producer and exporter was in like circumstances with producers and exporters of other products, such as flowers, seafood and minerals that were subject to a similar regime for the calculation of VAT on their exports.[1698] Guatemala's attempt to distinguish *Occidental* on the basis that its courts have a certain degree of discretion in deciding *amparo* cases, while the tax authority lacked such discretion in issuing the VAT reimbursements in dispute in Occidental,[1699] is a distinction without a difference given that none of the Guatemalan court decisions at issue here even attempted to provide a reason why, against the background of their contradictory decisions, the suspension of Exmingua's exploitation license was adequate or necessary in order for the MEM to conduct consultations.[1700]

[1692] Clms' Mem. ¶¶ 315-316.

[1693] *Id.* ¶¶ 317-323.

[1694] Resp's C-M ¶ 626.

[1695] *Id.* ¶ 628.

[1696] *Id.*

[1697] *William Ralph Clayton and others v. Government of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 Mar. 2015 ¶ 695 (CL-0088).

[1698] *Occidental Exploration and Production Co. v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award dated 1 July 2004 ¶ 173 (CL-0200).

[1699] *See* Resp's C-M ¶ 629.

[1700] *See supra* § III.E.

566. Accordingly, contrary to Guatemala's assertions, Exmingua and Oxec were in like circumstances for the purpose of DR-CAFTA Article 10.3. The same is true, by extension, for Claimants' and Oxec's investors.

ii. Claimants And Exmingua Are In Like Circumstances With Minera San Rafael And CGN, And Their Respective Investors, For The Purpose Of DR-CAFTA Article 10.4

567. Guatemala's assertion that Exmingua was not in like circumstances with Minera San Rafael or CGN because of Exmingua's alleged lack of contribution to the local communities and the difference in the size of their operations is erroneous.[1701]

568. As Claimants have shown above, Guatemala's allegations regarding Exmingua's lack of involvement with the local communities are meritless.[1702] Exmingua provided substantial help to local communities, which was not limited to "raffle prizes and food giveaways," as it is presented by Guatemala.[1703]

569. Furthermore, contrary to Guatemala's assertions,[1704] the difference in the size of the companies' operations is irrelevant for the purposes of the measures at issue and Claimants' MFN claim.[1705] In *Clayton v. Canada*, for example, the tribunal held that the claimants' quarry project was in like circumstances with another quarry project that covered six times the area and produced 300% more than the claimants' project, where both projects were subject to a similar environmental regulation.[1706] In *Levy de Levi v. Peru*, the only legal authority cited by Guatemala, the tribunal considered the size of the claimant's bank solely because it was relevant to the alleged treaty violation – the State's failure to bail out the claimant's bank (which held 2% of national deposits, primarily of

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[1701] *See* Resp's C-M ¶¶ 642-645.

[1702] *See supra* § II.C.3.

[1703] Resp's C-M ¶ 645.

[1704] Resp's C-M ¶¶ 643-644.

[1705] *See also* U.S. NDP Sub. ¶ 33.

[1706] *William Ralph Clayton and others v. Government of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 Mar. 2015 ¶ 697 (CL-0088); *see also, e.g., Occidental Exploration and Production Co. v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award dated 1 July 2004 ¶¶ 167-179 (CL-200); *S.D. Myers, Inc. v. Government of Canada,* NAFTA, UNCITRAL, Partial Award dated 13 Nov. 2000 ¶¶ 243-251 (CL-0104); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/99/1, Award dated 16 Dec. 2002 ¶¶ 170-172 (CL-0093); *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/04/5, Award dated 21 Nov. 2007 ¶¶ 201-202 (CL-0195); *Corn Prods. Int'l Inc. v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility dated 15 Jan. 2008 ¶ 120 (CL-0196); *Cargill, Inc. v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/05/2, Award dated 18 Sept. 2009 ¶¶ 211-214 (CL-0197).

businesses), while providing financial assistance to more systematically-important banks (holding 51% of national deposits, primarily of individuals) when they were facing liquidity shortages.[1707]

570. Accordingly, contrary to Guatemala's assertions, Exmingua, Minera San Rafael and CGN are in like circumstances with each other for the purpose of Claimants' MFN claim. By extension, the same is true for Claimants and the foreign investors owning Minera San Rafael and CGN.

b. Claimants And Exmingua Were Treated Less Favorably Than Oxec, Minera San Rafael And CGN, And Their Investors

i. The Guatemalan Courts And The MEM Failed To Apply The Same Standard to Exmingua and Oxec

571. Guatemala's assertion that, even if Claimants and Exmingua were in like circumstance with Oxec and its investors, the Guatemalan courts' treatment of Oxec was not more favorable than their treatment of Exmingua, because both companies were subjected to the same standard of review by the Constitutional Court, blatantly ignores the facts of this case.[1708] As Claimants have explained in their Memorial, the Guatemalan Constitutional Court subjected Exmingua to unequal and unfavorable treatment by suspending its operations, while allowing Oxec to continue to operate until the MEM concluded consultations, despite the fact that the Guatemalan courts found exactly the same violations (by the MEM of the consultation requirement under ILO Convention 169) in both cases.[1709]

572. Guatemala fails to provide any information corroborating its statement that the Guatemalan Constitutional Court applied the same standard to Oxec and Exmingua, asserting merely that the Constitutional Court was entitled to exercise seemingly unlimited discretion when deciding whether to prioritize the operation of an energy project, as a project of "national urgency," over the operation of a mine, which is only viewed as a "public good" by Guatemala.[1710] Guatemala's assertion that a decision-maker can exercise complete discretion in relation to deciding substantially-similar cases differently without violating an NT or MFN obligation is absurd. Moreover, Guatemala utterly fails to explain how the suspension of Exmingua's project was adequate or necessary for the MEM to conduct consultations, while a suspension was not adequate or necessary in the case of Oxec's project.

[1707] *Renee Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award dated 26 Feb. 2014 ¶¶ 180, 398-399 (RL-0251).

[1708] Resp's C-M ¶¶ 631-636.

[1709] Clms' Mem. ¶ 325.

[1710] Resp's C-M ¶¶ 626, 633.

573. The decision in *Clayton v. Canada*, the only legal authority cited by Guatemala, also does not support Guatemala's case.[1711] In *Clayton*, the tribunal found a breach of the NT obligation where, similar to this case, the State, at its own discretion, applied an unusually stringent standard of review to the foreign claimants, while choosing to use another standard in relation to local investors that were subject to a similar regulatory regime.[1712]

574. Guatemala makes a similarly nonsensical assertion that the MEM's completion of consultations for Oxec within a mere couple of months from the Constitutional Court's decision was not more favorable than a more-than-five-year-long, ongoing delay in the commencement, let alone completion, of consultations for Exmingua.[1713] Guatemala attempts to justify this delay by stating that the consultations process for Exmingua is based on the same procedure for consultations that was developed for Oxec.[1714] Guatemala further asserts that, unlike in the case of Oxec, the MEM is not yet obligated to conduct consultations for Exmingua, because the decision of the Constitutional Court has not yet become final and binding.[1715]

575. Guatemala's position only further reinforces Claimants' case by highlighting the unusual failure of the MEM to commence, let alone complete, consultations for Exmingua for the period of more than five years. Guatemala's assertion that the MEM's consultation process for Exmingua is based on the same procedure that was developed for Oxec further points out the MEM's failure to promptly present any specific program for Exmingua's consultations after the Constitutional Court's 28 June 2016 *amparo definitivo*, which ordered the MEM to determine the procedure for consultations.[1716]

576. Moreover, as demonstrated in detail above, Guatemala's further argument that it is precluded from commencing consultations in Exmingua's case because the Constitutional Court's June 2020 ruling is not yet final, is belied by the MEM's 2020 report to the Constitutional Court, which reveals that the MEM considered itself bound to initiate consultations after the earliest of the Courts'

[1711] *Id.* ¶ 632.

[1712] Clms' Mem. ¶¶ 318-319; *William Ralph Clayton and others v. Government of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 Mar. 2015 ¶¶ 685-688, 696-700 (CL-0088).

[1713] Resp's C-M ¶¶ 637-639.

[1714] *Id.* ¶ 637.

[1715] Resp's C-M ¶¶ 638-641.

[1716] Clms' Mem. ¶ 91.

decisions in late 2015.[1717] These circumstances, involving a continuous ongoing breach of Article 10.3 of the DR-CAFTA are drastically different from those in *Enkev Beheer v. Poland* and *Achmea v. Slovakia (II)*, on which Guatemala relies,[1718] where the tribunals decided that plans that could lead to a future breach of an investment treaty were not sufficient to establish a breach.[1719]

577. Guatemala further alleges that, because on Claimants' case, each of the alleged breaches targeted Exmingua and did not directly target Claimants, Claimants have failed to prove the existence of discriminatory intent, which, according to Guatemala, is necessary to prove a breach of the NT and MFN standards.[1720] Additionally, Guatemala states that its treatment of Exmingua was not based on any discriminatory intent, because all of its actions were carried out in furtherance of rational and non-discriminatory government policies.[1721] Accordingly, Guatemala concludes that Claimants' DR-CAFTA Articles 10.3 and 10.4 claims should fail.[1722]

578. As Claimants demonstrated above, discriminatory intent is not required to be shown for an NT or MFN claim.[1723] Guatemala's further argument that its actions were carried out in furtherance of rational and non-discriminatory government policies is belied by the fact that none of these actions included any balancing between the interests of Exmingua and the State's interest in conducting consultations pursuant to ILO Convention 169, which should have involved a proportionality analysis, including an assessment of whether the suspension of Exmingua's operations was adequate and necessary for the MEM's conduct of the consultations, as already set out above.[1724] The State's failure to conduct such a balancing test and proportionality assessment is compounded by the fact that

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[1717] *See supra*, § II.D.4; *see also* Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, MEM Report dated 10 June 2011, submitted to the Constitutional Court on 11 June 2020 under cover of Letter from the MEM dated 9 June 2020, at 4, 7, 12, 15 (C-0872).

[1718] Resp's C-M ¶ 641.

[1719] *Enkev Beheer BV v. Poland*, PCA Case No. 2013-01, First Partial Award dated 29 Apr. 2014 ¶¶ 338-339, 380 (RL-0249); *Achmea B.V. v. Slovakia (II)*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility dated 20 May ¶¶ 236, 238, 251 (RL-0250).

[1720] Resp's C-M ¶¶ 659-662; *see also* Resp's C-M ¶¶ 303-304 (arguing the same with respect to Claimants' FET claim).

[1721] Resp's C-M ¶¶ 663-665.

[1722] *Id.* ¶ 665.

[1723] *See supra* § III.F.1. It is similarly unnecessary to prove the existence of discriminatory intent for the purpose of demonstrating a violation of Article 10.5 of the DR-CAFTA. *See*, *e.g.*, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award dated 25 Nov. 2015 ¶ 7.152 (RL-0253) ("[T]he Tribunal considers that discriminatory effects of the measures are sufficient to breach the prohibition. The Tribunal does not consider that there is a separate requirement to prove discriminatory intent by Hungary . . . or that evidence of discrimination based on nationality is required. . . . Nevertheless, the Tribunal agrees with Hungary's submission that a breach of this standard requires the impairment caused by the discriminatory or unreasonable measure to be significant."); *El Paso Energy Int'l Co. v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award dated 31 Oct. 2011 ¶ 305 (CL-0047) ("[T]he Tribunal does not agree with Argentina's contention that discriminatory intent is necessary for a measure to be discriminatory. It is sufficient that, objectively, two similar situations are not treated similarly").

[1724] *See supra* § III.E.

it penalized Exmingua for the State's failure to perform the State's obligation to conduct consultations under ILO Convention 169, while there has been no finding of any wrongdoing by Exmingua. The State here clearly abused its discretion through arbitrary and discriminatory conduct to the detriment of Exmingua.

ii. The Guatemalan Courts Imposed Additional Conditions On Exmingua

579. Guatemala is wrong in asserting that the Constitutional Court did not create any additional conditions for Exmingua when it ruled that Exmingua could not resume operations unless "a determination is made that operations would not threaten the existence of the indigenous population in the vicinity of the mining project."[1725] Guatemala attempts to justify its position by quoting long passages from the Constitutional Court's decisions in the *Oxec*, *Minera San Rafael* and *CGN* cases.[1726] This is unavailing.

580. None of these quotes show that the Constitutional Court created a similarly onerous condition for Oxec, Minera San Rafael or CGN to resume their operations (to the extent they were even suspended, which was not the case for Oxec). As Claimants explained in their Memorial, this condition was additional, onerous, subjective and uncertain for Exmingua, and not imposed on other companies with which it is in like circumstances.[1727]

iii. The Guatemalan Courts Failed To Resolve Exmingua's Case In A Non-Discriminatory Manner

581. Guatemala's assertion that the failure of the Guatemalan courts to resolve Exmingua's *amparo* proceedings within a similar timeframe as the proceedings for Oxec, Minera San Rafael or GCN was not discriminatory, because the courts resolved all of these cases in an equally efficient manner,[1728] could not be further from the truth. Guatemala seemingly explains the differences in the duration of these cases by highlighting the existence of violent protests at Minera San Rafael, which had spread to Guatemala City,[1729] thus prompting the faster resolution of the case, and by blaming Exmingua for any delays in the resolution of its case, stating that it was "very active in the courts."[1730]

[1725] Resp's C-M ¶ 650.
[1726] *Id.* ¶¶ 646-649.
[1727] Clms' Mem. ¶ 326 and § III.D.2.c.
[1728] Resp's C-M ¶¶ 651-655.
[1729] *Id.* ¶ 654.
[1730] *Id.* ¶ 655.

582. Guatemala's explanation falls far short of justifying the almost six-year delay in the resolution of court proceedings relating to Exmingua's exploitation license, let alone the almost four years taken by the Constitutional Court to rule on Exmingua's appeal. Oxec, Minera San Rafael, and CGN also defended their interests in Guatemalan courts. The site of Exmingua's mine also was subjected to violent protests, including the 2016 protests that were sparked by the MEM's initial refusal to suspend Exmingua's license as ordered by the Supreme Court, and those protests also spread to Guatemala City.[1731] As Claimants explained in their Memorial, the delay by the Constitutional Court in ruling on Exmingua's appeal was unprecedented and in violation of Guatemalan law.[1732] The Guatemalan courts have treated Exmingua less favorably than Oxec, Minera San Rafael and CGN when they resolved the same issues with respect to the conduct of consultations in less than half that time even though these cases were filed after Exmingua's case.[1733]

583. Accordingly, contrary to Guatemala's assertions, Exmingua was subjected to discriminatory treatment by the Guatemalan courts.

c. Claimants Have Sufficiently Particularized Their MFN Claim

584. Guatemala asserts that Claimants failed to articulate an MFN claim, because Claimants purportedly failed to allege any treatment of PSA and Soloway, the foreign investors in Minera San Rafael and CGN, and failed to make any comparison between Claimants' investment in Exmingua and the investments by PSA and Soloway in Minera San Rafael and CGN, respectively. Guatemala argues that Claimants thus failed to satisfy the burden of proof for their MFN claim.[1734]

585. In this regard, Guatemala mischaracterizes Claimants' submissions, which focus on comparing the treatment of Exmingua (Claimants' investment) with the treatment of Minera San Rafael and CGN (the investments of PSA and Soloway, respectively).[1735] This is consistent with the formulation of the MFN standard in DR-CAFTA Article 10.4, which explicitly protects both investors and investments in separate provisions.[1736] Here, Claimants clearly are invoking the MFN protection of its investment, Exmingua, and, consequently, the appropriate comparators are Minera San Rafael and CGN. Claimants have satisfied the burden of proof for their MFN claim by establishing in their

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[1731] *See supra* § II.D.2.

[1732] Clms' Mem. ¶ 327 and § III.D.2.a.

[1733] *Id.* § II.E.3.

[1734] Resp's C-M ¶¶ 656-658.

[1735] Clms' Mem. ¶¶ 324-328.

[1736] *See* DR-CAFTA, Art. 10.4.1 (CL-0001) (MFN treatment of investors); i*d.* at Art. 10.4.2 (MFN treatment of investments).

Memorial that their investment, Exmingua, was in like circumstances with Minera San Rafael and CGN.[1737] Claimants further have established that Exmingua received less favorable treatment than Minera San Rafael and CGN, thus satisfying the requirements of DR-CAFTA Article 10.4.[1738]

586. Accordingly, Claimants have sufficiently articulated and satisfied the burden of proof for their MFN claim.

G. Guatemala's Counterclaim is Baseless

587. Guatemala's US$ 2 million counterclaim[1739] fails as both a matter of law and fact. The Parties' arbitration agreement is contained in the Treaty, which does not provide for jurisdiction over Respondent's counterclaim. Even if the Tribunal had jurisdiction – which it lacks – Respondent's counterclaim against Claimants for compensation for future amounts, which Respondent speculates it may spend to perform environmental remediation at the Project sites should Exmingua fail at some unknown future time to comply with Guatemala's domestic environmental laws, is premised entirely on falsehoods and unproven speculation. Indeed, Respondent's half-hearted attempt to support its counterclaim exposes its true motive for even raising it, which is merely to smear Claimants' reputations with unfounded and false accusations.

1. The Tribunal Lacks Jurisdiction Over Respondent's Counterclaim

588. The Treaty does not provide any basis for jurisdiction over Respondent's counterclaim. In fact, its plain text confirms that the Tribunal has jurisdiction only over Claimants' claims against Respondent for Respondent's breaches of its Treaty obligations.

589. DR-CAFTA Article 10.16.1 provides in relevant part:

> (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim
>
> (i) that the respondent has breached
>
> (A) an obligation under Section A,
>
> (B) an investment authorization, or
>
> (C) an investment agreement;

[1737] Clms' Mem. ¶ 323.

[1738] *Id.* ¶¶ 324-328.

[1739] Resp's C-M ¶¶ 930-939.

and

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach[.][1740]

590. Article 10.28, in turn, defines "claimant" as "an investor of a Party that is a party to an investment dispute with another Party," and "respondent" as "the Party that is a party to an investment dispute."[1741] The term "Party" is defined in the General Definitions of Article 2.1 as "any State for which this Agreement is in force."[1742]

591. Thus, in accordance with the plain terms of the Treaty, the arbitration agreement extends only to certain types of investment disputes filed by *Claimants against Respondent*. The ordinary meaning of the Treaty's text makes this clear by providing that "*the claimant*" may submit to arbitration certain claims alleging a breach by a respondent State; the Treaty does not contain any agreement to arbitrate claims brought by a respondent State against a claimant-investor.

592. Absent consent to arbitrate, there is no jurisdiction over Respondent's counterclaim. Indeed, as the *Oxus Gold v. Republic of Uzbekistan* tribunal acknowledged in a case arising under the UNCITRAL Arbitration Rules, even where the possibility of raising a counterclaim is envisioned in the governing arbitration rules, such provision cannot create "jurisdiction where there is none"; all that it can do "is stat[e] that counter-claims are admissible and can be submitted *to the extent that they already fall under the scope of jurisdiction* of the Arbitral Tribunal."[1743]

593. As shown, however, the governing Treaty does not contain any such consent. Respondent's reliance on DR-CAFTA Article 10.20.7 as a source of jurisdiction[1744] is widely off the mark. That Article provides that a "respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract."[1745] The Article thus clarifies that the respondent State may not raise certain facts as a defense to a claim; it in no way

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[1740] DR-CAFTA Art. 10.16 (C-0001). DR-CAFTA Article 10.16(1)(b) provides that a claimant may bring these same claims on behalf of an enterprise of the respondent State that the claimant owns or controls, directly or indirectly.

[1741] *Id.* at Art. 10.28.

[1742] *Id.* at Art. 2.1.

[1743] *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Final Award dated 17 Dec. 2015 ¶ 944 (CL-0291) (emphasis added) (referring to UNCITRAL Arbitration Rules Article 21(3) [2010], which provides that "the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it").

[1744] *See* Resp's C-M ¶ 933.

[1745] DR-CAFTA Art. 10.20.7 (C-0001).

grants a tribunal jurisdiction over counterclaims or even implies that a tribunal has any such jurisdiction, as it does not provide any consent to arbitrate.

594. In cases interpreting treaties with similar language, tribunals have held that the only party entitled to bring claims is the investor and, accordingly, have dismissed counterclaims. In rejecting jurisdiction over Guatemala's counterclaim, the *Iberdrola II* tribunal, for example, found the language of Article 11(1) and (2) of the Spain-Guatemala BIT to be dispositive. Like DR-CAFTA Articles 10.16.1 and 10.17.1, Article 11(1) and (2) of the Spain-Guatemala BIT provides that an investment dispute "shall be notified in writing . . . by the investor" and, if the dispute is not resolved, "the dispute may be submitted [to arbitration] at the choice of the investor."[1746] The *Iberdrola II* tribunal declared that this Article makes clear that

> what can be submitted to arbitration is a dispute relating to an investment between an investor of one Contracting State and the other Contracting State concerning matters governed by the Treaty and such dispute can only be brought to arbitration by the investor. It is thus clear from the wording of the dispute settlement clause, which constitutes the offer to arbitrate, that the Contracting Parties *only* envisaged claims initiated by the investor. . . . The limitation is understandable as the Treaty provides for rights in favor of the investor, not for obligations . . . .[1747]

595. Similarly, the Turkey-Pakistan BIT at issue in *Karkey v. Pakistan* provides that the investor shall give notice of a dispute to the respondent State and that, if the dispute is not resolved within six months, the investor may submit the dispute to arbitration.[1748] In light of the plain language of that treaty, the *Karkey* tribunal denied jurisdiction over the respondent's counterclaim under the BIT, holding that the references to "investor" in the aforementioned provisions "means that the BIT is intended to enable arbitration only at the initiative of the investor. The BIT imposes no obligation on investors, only on the Contracting State."[1749]

596. The *Anglo American v. Venezuela* tribunal likewise dismissed the respondent State's counterclaim where the BIT in question provided that the "jurisdiction of the arbitral tribunal shall be limited to determining whether there has been a breach *by the Contracting Party* concerned of any of its obligations under this Agreement, whether such breach of its obligations has caused damage to the

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[1746] *Iberdrola Energía S.A. v. Republic of Guatemala II* UNCITRAL/PCA Case 2017-41, Final Award dated 24 Aug. 2020 ¶ 382 (CL-0292) (tribunal quoting Article 11 of the BIT).

[1747] *Id.* ¶ 386 (emphasis added).

[1748] *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award dated 22 Aug. 2017 ¶ 1012 (tribunal quoting Article VII of the BIT) (CL-0217).

[1749] *Id.* ¶ 1013.

national or company concerned, and, if such is the case, the amount of compensation."[1750] The tribunal accordingly held that the language of the treaty "excludes the possibility that the Counter-claim is 'within the scope of the arbitration agreement of the parties.'"[1751] This is in contrast with the wording of other treaties, such as the Spain-Argentina BIT at issue in *Urbaser v. Argentina*, on which Respondent relies, which provides that either party may submit a claim to arbitration.[1752]

597. Here, not only does the plain text of the Treaty limit arbitration to claims brought by *claimants against respondent States*, but it also restricts the *types* of disputes that may be the subject of arbitration. Specifically, the Treaty limits claims to those for a violation of an obligation contained in Section A of the Treaty or breach of an investment agreement or authorization. Respondent's counterclaim alleges none of these things: there is no investment agreement or authorization between Claimants and Respondent, and Respondent does not even allege – much less prove – that Claimants have violated an obligation set forth in Section A of the Treaty. Nor could Respondent do so, as those obligations are all obligations that the *State Parties* have undertaken towards investors. Claimants, for instance, have no obligation to accord *Respondent* fair and equitable treatment or national treatment.[1753] And, of course, Claimants are legally incapable of expropriating a State's property.[1754]

598. Indeed, numerous tribunals have denied jurisdiction over counterclaims where the applicable treaty limited consent to arbitration to claims alleging breaches of the treaty's obligations undertaken by respondent States.[1755] Like here, the respondent State in *Rusoro Mining v. Venezuela* raised a

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[1750] *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award dated 18 Jan. 2019 ¶ 526 (CL-0293) (tribunal quoting Article 8(3) of the BIT) (emphasis added).

[1751] *Id.* ¶ 528; *see also Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award dated 7 Dec. 2011 ¶ 869 (CL-0174) ("[T]he references made in the text of Article 9(1) of the BIT to '*disputes . . . concerning an obligation of the latter*' undoubtedly limit jurisdiction to claims brought by investors about obligations of the host State. Accordingly, the BIT does not provide for counterclaims to be introduced by the host state in relation to obligations of the investor.") (emphasis added).

[1752] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award dated 8 Dec. 2016 ¶ 1143 (RL-0129) (quoting the language of Article X of the BIT and remarking that it allows any dispute "between the parties" to be submitted to arbitration "at the request of either party"); *Id.* ¶ 1144 (holding that it "follows from the dual possibility to initiate an arbitration that the BIT does include . . . the hypothesis of a counterclaim . . . .").

[1753] DR-CAFTA Art. 10.5 (CL-0001) (Minimum Standard of Treatment: "Each *Party shall accord to covered investments*" and "full protection and security requires *each Party to provide* . . .") (emphasis added); *see also Id.* Art. 10.3 (National Treatment: "Each *Party shall accord to investors*" and "Each *Party shall accord to covered investments*") (emphasis added); *Id.* Art. 10.4 (Most-Favored-Nation Treatment: same).

[1754] *See Id.* at Art. 10.7 (Expropriation and Compensation: "*No Party* may expropriate or nationalize . . . .") (emphasis added).

[1755] Although the DR-CAFTA does not limit the Parties' consent to arbitrate to disputes alleging a violation of an obligation in Section A of the Chapter 10 of the Treaty, insofar as it provides consent to arbitrate disputes alleging breaches of investment agreements or authorizations, because there are no such instruments in this case, these additional bases for jurisdiction are irrelevant.

counterclaim, alleging that the claimant had caused damage by failing to adhere to the mine plan.[1756] As the tribunal noted, however, "the purpose of the arbitrations [was] for arbitrators to adjudicate disputes relating 'to a claim by the investor that a measure taken or not taken by [the host State] is in breach of this Agreement . . . .'"[1757] The tribunal thus held that it lacked jurisdiction to decide the counterclaim,[1758] because

> the obligations allegedly breached by Rusoro do not derive from and have no connection with the Treaty; [ ] the Tribunal must decide the dispute in accordance with the Treaty and the principles of international law, and the dispute underlying the counterclaim – that Rusoro breached the mine plan – and cannot be adjudicated by applying the Treaty or principles of international law; [ ] the Treaty does not afford host States a cause of action against an investor of the other Contracting Party, be it by way of claim or of counterclaim.[1759]

Each of these observations is equally true in this case.

599. Nor can the *Aven v. Costa Rica* award, on which Respondent relies, revive Respondent's counterclaim. Although the *Aven* tribunal somewhat confusingly reasoned that it had *prima facie* jurisdiction over the respondent's counterclaim,[1760] it nevertheless dismissed the counterclaim

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[1756] *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award dated 22 August 2016 ¶ 628 (CL-0204).

[1757] *Id.* ¶ 627.

[1758] *Id.* ¶ 629.

[1759] *Id.* ¶ 628; *see also Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/04, Award dated 15 Apr. 2016 ¶ 333 (CL-0166) (deeming counterclaim inadmissible because the BIT provided for arbitration of disputes "concerning an obligation of the [respondent State] under this Agreement in relation to an investment of [an investor of the other Party to the BIT]" and the counterclaim "does not concern an obligation of Venezuela under the BIT"); *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award dated 7 Dec. 2011 ¶¶ 868-869 (CL-0174) (rejecting jurisdiction over the respondent's counterclaim when the applicable BIT's dispute resolution clause provided for arbitration of "[d]isputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former …"). Respondent's reliance on the dissent in *Roussalis* is unavailing. The dissent ignores the specific language in the governing BIT, which restricted the Parties' consent to arbitrate claims for breach of the State's obligations under the BIT. *See also Id.* ¶ 871 (explaining that "the BIT imposes no obligations on investors, only on contracting States"); *Iberdrola Energía S.A. v. Republic of Guatemala II* UNCITRAL/PCA Case 2017-41, Award dated 24 Aug. 2020 ¶ 389 (CL-0292) (noting that the *Goetz v. Burundi* tribunal, on which decision Respondent also relies (*see* Resp's C-M ¶ 934) cited approvingly Prof. Reisman's dissent in *Roussalis*, and observing that it "has difficulty following this line of reasoning in a situation such as the present one and the one in *Roussalis*, where the wording of the Treaty provision indicates, to the contrary, that only the investor can claim. While the Tribunal agrees that arbitration rules referred to in a treaty are incorporated by reference, this is only to the extent that they are not contradicting the treaty."); Pierre Lalive and Laura Halonen, *On the availability of Counterclaims in Investment treaty* Arbitration, 2 CZECH Y.B. INT'L LAW 141, 146 (2011) (CL-0294) (noting that "the arbitration agreement should refer to disputes that can also be brought under domestic law for counterclaims to be within the tribunal's jurisdiction"); *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award dated 8 Dec. 2016 ¶ 1191 (RL-0129) (noting that, unlike the BIT at issue here, "the possible scope of claims to be submitted to arbitration under Article X is not limited to rights directly based on the application (or interpretation) of the BIT.").

[1760] *Cmp. David Aven* et al. *v. Republic of Costa Rica*, Case No. UNCT/15/3, Award dated 18 Sept. 2018 ¶¶ 732, 733, 742 (RL-0031) (quoting DR-CAFTA Articles 10.9.3 and 10.11 and remarking that "[i]t could be argued that Section A also contains, at least implicitly, some obligations to investors, especially with respect to the environmental laws of the host State" and observing that "the Tribunal does not find any reason of principle to declare inadmissible a counterclaim in which

because, *inter alia*, the DR-CAFTA does not impose any affirmative obligations on investors.[1761] In particular, the tribunal acknowledged that the DR-CAFTA does not "provide that any violation of state-enacted environmental regulations will amount to a breach of the Treaty which could be the basis of a counterclaim."[1762]

600. Finally, Respondent's appeal to "efficiency"[1763] cannot cure the jurisdictional defect with its counterclaim. In fact, the publications of "various authors" – namely, the President and another member of this Tribunal – whom Respondent misleadingly quotes, expressly undermine Guatemala's argument, which may explain why Guatemala failed to submit the quoted publications into the record.[1764] As the *Iberdrola v. Guatemala II* tribunal remarked in dismissing Guatemala's counterclaim for lack of jurisdiction, a tribunal's "role is limited to applying the treaty on the basis of which it is seized in accordance with its terms. It cannot go beyond or else it would engage in policy choices which are the domain of the States."[1765]

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the Respondent State claims that the foreign investor has breached obligations falling within the scope of Article 10, Section A DR-CAFTA [and] [t]hus, the Tribunal has *prima facie* jurisdiction over the counterclaim ….") *with Id.* ¶ 743 (holding that DR-CAFTA "Article 10.9.3.c and 10.11 … do not –in and of themselves- impose any affirmative obligations upon investors").

[1761] *David Aven* et al. *v. Republic of Costa Rica*, Case No. UNCT/15/3, Award dated 18 Sept. 2018 ¶ 743 (RL-0031). Respondent misleadingly focuses on this case as the centerpiece of its argument, without ever acknowledging that the tribunal denied jurisdiction over the respondent's counterclaim. *See* Resp's C-M ¶¶ 930-932.

[1762] *David Aven* et al. *v. Republic of Costa Rica*, Case No. UNCT/15/3, Award dated 18 Sept. 2018 ¶ 743 (RL-0031).

[1763] Resp's C-M ¶ 934 (arguing that "various authors have also expressed their views, emphasizing, *inter alia*, the reasons why State counterclaims should be permitted (including reasons of efficiency and to avoid inconsistent results in different forums) ….").

[1764] *See* Resp's C-M n.1692 (*quoting* Jean Kalicky [*sic*], Counterclaims by States in Investment Arbitration, [IISD] (14 de enero de 2013) (CL-0175) [*sic*]). This article does not appear at CL-0175 or anywhere else in the record. Notably, the article states that, while the approach taken by Professor Reisman in his *Roussalis* dissent "may be satisfying from a policy perspective, it arguably is not consistent" with the requirement of consent "as an *extrinsic* precondition to the tribunal's hearing counterclaims," and, for this reason, "the *Roussalis* majority's conclusion that a claimant's mere filing at ICSID is insufficient in and of itself to create consent to counterclaims is more intellectually robust . . . ." The article further distinguishes the result in *Goetz v. Burundi*, on the basis that the applicable BIT in that case "covered disputes concerning the interpretation or application of any investment authorization granted by host State authorities." Jean Kalicki, Counterclaims by States in Investment Arbitration, IISD (14 Jan. 2013) (CL-0295) (emphasis added). The quotation from Professor Douglas's book does not appear at RL-0007 or anywhere else in the record. *See* Resp's C-M n.1693. In that treatise, Professor Douglas states, "*[w]here the consent of the contracting parties* to investor/state arbitration in an investment treaty *is couched in broad terms*, there is nothing in principle to exclude a tribunal's *ratione materiae* jurisdiction over counterclaims by the host state," "consent to arbitration in relation to 'all disputes arising out of an investment', for instance, is wide enough to encompass counterclaims by the host state. Where the consent to arbitration is expressed in narrow terms, such as in Articles 1116 and 1117 of NAFTA, which limits the scope of primary claims to a breach of an international obligation in Section A of Chapter 11, the position is far more tenuous" and "it would be preferable to construe Chapter 11 of NAFTA as excluding the possibility of counterclaims by the host state respondent." Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 256-257 (2009) (CL-0296) (emphasis added)

[1765] *Iberdrola Energía S.A. v. Republic of Guatemala II* UNCITRAL/PCA Case 2017-41, Award dated 24 Aug. 2020 ¶ 392 (CL-0292).

2. Guatemala's Counterclaim Also Fails On The Facts

601. Even if the Tribunal had jurisdiction over the counterclaim – which it clearly does not have – the counterclaim would fail for lack of evidence. As the tribunal in *Aven v. Costa Rica* explained in providing an additional reason for dismissing the respondent's counterclaim, the party advancing a counterclaim bears the same burden of proving its factual assertions as a party that advances its primary claim, and sweeping allegations without evidence supporting the alleged violation or specific quantification of damage *in the first pleading* submitted by the party making the counterclaim requires its dismissal:[1766]

> Costa Rica only made a general reference to environmental damages in the Las Olas Project site attributed to the Claimants' activity. There is no precise statement of the facts supporting the claims but rather a reference to expert reports attached to those pleadings. There is no specification of the relief sought but in very general terms and the quantification is much approximated, based only in the personal experience of an expert rather than any accurate method of valuation. Moreover, the evidence that Costa Rica has mentioned is diluted in its statement of defense, without specifying clearly and precisely the facts to be proved within the counterclaim, particularly the evidence that the Claimants are the perpetrators of all environmental damages.[1767]

602. Guatemala's counterclaim is equally deficient. The factual basis for Respondent's counterclaim is contained in just a single sentence without citation to any supporting evidence: "The State should not be left in the position of not only having to pay the costs of this arbitration proceeding, but also to remedy the environmental damage caused by Claimants."[1768] Respondent has not even attempted to demonstrate that Claimants – or Exmingua –have caused any environmental damage. Rather, it admits that its counterclaim is premised on pure speculation that it may, in the future, suffer damages.

603. Specifically, Respondent first states that, if Guatemala prevails in the arbitration, "one certain possibility is that Claimants will abandon the mining project." Far from being "certain," Respondent itself admits that this is a mere "possibility." Respondent, moreover, supports its speculation that Claimants will "abandon the mining project" with allegations that the project lacks community support and Claimants lack "the technical or financial capacity to return to work."[1769] Respondent

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[1766] *David Aven* et al. *v. Republic of Costa Rica*, Case No. UNCT/15/3, Award dated 18 Sept. 2018 ¶ 745 (RL-0031).
[1767] *Id.*
[1768] Resp's C-M ¶ 939.
[1769] *Id.* ¶ 938.

then asks the Tribunal to draw this latter, incorrect inference from the fact that Claimants' arbitration claim is third-party funded.[1770]

604. The Treaty is clear, however, that *any* claim may only be submitted to arbitration if [the respondent] "*has breached*" an obligation and [the investor] "*has incurred* loss or damage by reason of, or arising out of, that breach."[1771] A claim – and, therefore, any counterclaim – may not be submitted to arbitration if a breach has not yet occurred or if loss or damage has not yet been sustained.[1772] Guatemala's Counterclaim thus fails at the threshold.

605. Respondent's spurious provocations that "[s]mall mining companies, like the Claimants, usually do not have a strong commitment to local communities," "[junior] mining companies [are] less transparent and ha[ve] concealed shareholders," "[j]unior mining companies do not care about their reputation," they "operate in a less responsible manner," and that "Claimants deserve this reputation,"[1773] are uninformed, unsupported, and defamatory.

606. Given the clear lack of jurisdiction over the counterclaim, as well as Respondent's failure to even make a prima facie case of breach or damages – much less prove the same – it is clear that Respondent's motivation in bringing the counterclaim is to disparage Claimants and drive up their costs in this proceeding. The Tribunal should sanction such behavior by awarding Claimants their costs in defending against the counterclaim.

IV. DAMAGES

A. Claimants Are Entitled To Full Reparation

607. As previously noted, the DR-CAFTA does not expressly set out the applicable standard of compensation for unlawful expropriations, or for violations of other investment protections.[1774] The

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[1770] *Id.*

[1771] DR-CAFTA Art. 10.16.1(a)(i),(ii) (C-0001); *Id.* at 10.16.1(b)(i), (ii).

[1772] Respondent "quantifies" the damage that it may in the future incur by reference to "the amount established in the EIA, updated according to the criteria of the mining experts of the Claimants themselves, i.e., the amount of USD 2 million . . . ." Resp's C-M ¶ 939. As Claimants' experts explained, however, the amount of US$ 2 million represents the closing costs in both the Progreso VII and Santa Margarita EIAs and, thus, the costs to close the entire Tambor Project, assuming mining on all areas had occurred. SRK I ¶ 57; *see also* Resp's C-M at n.1697 (misleadingly quoting SRK's report by using ellipses to omit this material information). Even under Guatemala's own distorted view of the facts, if Respondent prevails in the arbitration and Claimants "abandon" the mine, the only closing costs that will be incurred by anyone are those which were estimated at US$ 1 million in the approved EIA. Progreso VII EIA dated 31 May 2010, at 137-138, Table 24 (C-0082); *see also* SRK I ¶ 57, n.56. Hypocritically, Respondent asserts that "the EIA does not have the information necessary to implement a mine closure and remediation plan" (Resp's C-M ¶ 937) and, yet, it not only approved that EIA but it also relies on it to quantify damages for its purported counterclaim. Resp's C-M ¶ 939.

[1773] Resp's C-M ¶¶ 936-937.

[1774] Clms' Mem. ¶ 329.

customary international law standard of compensation of "full reparation" accordingly applies.[1775] In arguing otherwise, Respondent's Counter-Memorial betrays a fundamental misunderstanding of Claimants' arguments as well as that of the applicable legal framework.

1. Respondent Distorts Claimants' Damages Claims As Being Limited To "Expropriation Valuation Calculations"

608. Respondent distorts Claimants' arguments when it states that "Claimants have only submitted expropriation valuation calculations" and have not considered the damages incurred for "any of their other individually considered claims . . . .".[1776] This results from a highly selective reading of Claimants' submissions and is irreconcilable with Respondent's own references to Claimants' Memorial setting out the applicable standard of damages for unlawful expropriations as well as for violations of other investment treaty protections.[1777]

609. Starting from this mistaken premise, Respondent then frames the *entirety* of its argument by reference to the "standard of compensation" under Article 10.7.2 of the DR-CAFTA,[1778] and does not comment upon the applicable standard of compensation for breaches of the Treaty's non-expropriation investment obligations. As such, Respondent's omission should be taken as an acknowledgment that "full reparation" is the correct standard for breaches of the Treaty's guarantees of fair and equitable treatment, including denial of justice and full protection and security, as well as MFN and national treatment, as set forth in Claimants' Memorial.[1779] This result also follows from Respondent's acknowledgement that the "CAFTA-DR is heavily influenced by the North America Free Trade Agreement (NAFTA),"[1780] as several "NAFTA tribunals have been particularly prominent"[1781] in assessing the amount of damages on the basis of the law of State responsibility.[1782]

[1775] *Id.* ¶ 329 (citing cases).

[1776] Resp's C-M ¶ 832.

[1777] *Id.* ¶ 822 (referring to Clms' Mem. ¶¶ 331-336).

[1778] *Id.* C-M ¶¶ 821- 832.

[1779] Clms' Mem. ¶ 333 (citing cases).

[1780] Resp's C-M ¶ 270.

[1781] IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW 3.136 – 3.141 (1st ed., 2009) (CL-0372).

[1782] *See, e.g.*, *S.D. Myers, Inc. v. Government of Canada,* NAFTA, UNCITRAL, Partial Award dated 13 Nov. 2000 ¶ 308 (CL-0104) ("Expropriations that take place in accordance with the framework of Article 1110 . . . are 'lawful' under Chapter 11 . . . . Under other provisions of Chapter 11, the liability of the host Party arises out of the fact that the government has done something that is contrary to the NAFTA and is 'unlawful' as between the disputing parties."); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/99/1, Award dated 16 Dec. 2002 ¶ 194 (CL-0093) ("NAFTA provides no further guidance as to the proper measure of damages or compensation for situations that do not fall under Art. 1110 (expropriation); […] It follows that, in case of discrimination that constitutes a breach of Article 1102, what is owed by the responding Party is the amount of loss or damage that is adequately connected to the breach. […] Thus, if loss

2. Article 10.7.2 Sets Out A Condition For A Lawful Expropriation

610. Respondent's argument that "Article 10.7.2 of CAFTA-DR sets forth the compensation standard applicable in case of expropriation"[1783] conflates a requirement for an expropriation to be lawful (*i.e.*, the payment of compensation), with the standard of compensation.

611. Article 10.7.2 does not provide a standard of compensation for a breach, but rather articulates what renders an expropriation lawful and, therefore, not a Treaty breach. In other words, "the duty to pay compensation as a modality of reparation differs from the treaty obligation to provide compensation for a taking since it stems from the secondary norms of international law of state responsibility."[1784] By its terms, Article 10.7.2 is a "treaty provision requiring compensation for a taking [which] creates a *primary* obligation, while the duty to provide reparation for unlawful expropriation is a *secondary* obligation that only applies when a breach of a primary obligation is established."[1785]

612. Respondent's confused premise pervades its submission[1786] and forms the basis for its erroneous argument that "in order to accept that the Tribunal has jurisdiction over an expropriation claim filed by Claimants … , such claim must be governed by Article 10.7 … , including the compensation standard set forth in Article 10.7.2, which regulates, *inter alia*, the appropriate date of valuation, establishing that this shall be the date of expropriation."[1787] Respondent's reasoning "conflates the treaty obligation to provide compensation for a taking with the obligation to pay damages for unlawful expropriation,"[1788] and stems from a misunderstanding of the Treaty and, more fundamentally, international law.

613. Although Respondent criticizes Claimants for "invoking certain decisions rendered under other treaties"[1789] and then states that "the contracting States under CAFTA-DR, agreed that the

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or damage is the requirement for the submission of a claim, it arguably follows that the Tribunal may direct compensation in the amount of the loss or damage actually incurred.").

[1783] Resp's C-M ¶ 821; *see also* US NDP Submission, ¶ 40.

[1784] David Khachvani, *Compensation for Unlawful Expropriation: Targeting the Illegality,* 32(2) ICSID REV. 385, 388 (2017) (CL-0297).

[1785] *Id.* (emphases added). *see also* Second Report by Special Rapporteur Roberto Ago, State Responsibility: The Origin of International Responsibility, (20 Apr. 1970) Doc A/CN.4/233, ¶ 7 (CL-0298) ("[I]t is one thing to define a rule and the content of the obligation it imposes and another to determine whether that obligation has been violated and what should be the consequences of the violation. Only the second aspect comes within the sphere of responsibility proper . . . .").

[1786] Resp's C-M ¶¶ 821- 832.

[1787] *Id.* ¶¶ 831.

[1788] David Khachvani, *Compensation for Unlawful Expropriation: Targeting the Illegality,* 32(2) ICSID REV. 385, 388 (2017) (CL-0297).

[1789] Resp's C-M ¶ 822 and fn. 1536; ¶ 827.

compensation standard applicable under Article 10.7.2 regulates the compensation due under any form of expropriation protected under the treaty,"[1790] it fails to cite anything in support of that assertion. In fact, to the contrary, certain authors rely upon the text of Article 10.7 to explain the difference between unlawful and lawful expropriations and the standard of compensation, stating that "[a]n expropriation which does not comply with the [Article 10.7] conditions is unlawful, triggering the state's obligation to provide reparation under customary international law pursuant to the Chorzów Factory standard."[1791] To put it succinctly,

> [I]f any of the cumulative conditions set out in the treaty expropriation article are not met, then (by definition) the expropriation has not complied with the treaty obligations and the treaty standard need no longer apply. As a consequence, tribunals have held that unlawful expropriations are to be compensated under the customary international law standard, rather than under the express terms of the BIT. The customary standard of compensation is set out in the famous Chorzów Factory case as one of full reparation, which 'must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.'[1792]

614. As detailed below, the DR-CAFTA is similar to other treaties in this respect – and tribunals have consistently recognized the distinction between (a) the payment of compensation as a criterion for determining the legality of an expropriation (as appears in Article 10.7.2 of the DR-CAFTA) and (b) the appropriate standard of compensation for unlawful expropriations.

3. Investment Arbitration Jurisprudence Supports Claimants' Interpretation

615. Respondent's criticisms that Claimants invoke "a *minority* of decisions rendered under treaties other than CAFTA-DR in an attempt to escape the provisions of the treaty they invoke" and that the cases referenced by Claimants concerned a situation where the "applicable treaty did not

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[1790] *Id.* ¶ 823.

[1791] BORZU SABAHI, NOAH RUBINS, ET AL., INVESTOR-STATE ARBITRATION 704-706 (2d ed., 2019) ¶ 21.05 (CL-0299) ("Provisions such as this recognize a state's right to expropriate the property of foreign investors, provided that it fulfils the conditions set forth in paragraph 1 . . . If these conditions are fulfilled, the expropriation is considered to be lawful. An expropriation which does not comply with the above conditions is unlawful, triggering the state's obligation to provide reparation under customary international law pursuant to the *Chorzów Factory* standard . . . .").

[1792] BLACKABY NIGEL, CONSTANTINE PARTASIDES, ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 494-495 (6th ed., 2015) (CL-0300).

contain specific provisions applicable to the claimed expropriation," do not hold water.[1793] For all its grand-standing regarding Claimants' purported attempts at "escap[ing] the provisions of" the DR-CAFTA, Respondent does not cite *a single case* under the DR-CAFTA that is at odds with Claimants' interpretation.

616. In fact, both academic consensus and recent jurisprudence favor Claimants' interpretation.[1794] As August Reinisch remarks, although it is "sometimes asserted that both lawful and unlawful expropriation trigger the same obligation to compensation," "[a]ctual case law [] largely adheres to the distinction between the two forms of takings."[1795] Indeed, "the *better view* is that an illegal expropriation will fall under the general rules of State responsibility, while this is not so in the case of a lawful expropriation accompanied by compensation."[1796] The observation that "[e]xpropriation clauses in investment treaties generally require that lawful expropriation must be accompanied by prompt, effective and adequate compensation. Expropriation clauses often contain further guidance, generally referring to the 'fair market value' of the investment. In turn, the [CIL] obligation to make full reparation governs the amount of compensation owed in cases of unlawful expropriation"[1797] applies equally to the DR-CAFTA.

617. For its part, Respondent relies upon a partially *dissenting* opinion in *Quiborax v. Bolivia*[1798] and the decision in *British Caribbean Bank v. Belize*.[1799] Even considered cumulatively, these can hardly be considered representative of the prevailing view under international investment law. The prevailing view, as also set out in Claimants' Memorial,[1800] is that "arbitral tribunals have *increasingly held* that the treaty standards of compensation for expropriation only apply in a lawful

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[1793] Resp's C-M ¶ 827 and fn. 1543 (citing *ADC v. Hungary*). Articles 10.7.1 and 10.7.2 of the DR-CAFTA and Article 4 of the Hungary-Cyprus BIT at issue in *ADC* are materially indistinct in the relevant respects. *See ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award dated 2 Oct. 2006 ¶ 368 (CL-0162).

[1794] *See, e.g., Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award dated 6 Feb. 2007 ¶¶ 349-352 (CL-0159); *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award dated 30 June 2009 ¶ 201 (CL-0145); *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award dated 2 Oct. 2006 ¶¶ 483-484 (CL-0162); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004 ¶ 238 (CL-0208).

[1795] August Reinisch, *Legality of Expropriation, in* STANDARDS OF INVESTMENT PROTECTION (August Reinisch ed., 2008), 200 (CL-0301).

[1796] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 100 (2nd ed. 2012) 99 (CL-0131).

[1797] HENRY G. BURNETT & LOUIS-ALEXIS BRET, ARBITRATION OF INTERNATIONAL MINING DISPUTES: LAW AND PRACTICE 19.07 (2017) (CL-302).

[1798] Resp's C-M ¶¶ 826, 828.

[1799] At ¶ 826 fn 1541 of its Counter-Memorial, Respondent quotes language, citing to *British Caribbean Bank Ltd. v. Government of Belize,* PCA Case No. 2010-18, Award (19 Dec. 2014) ¶ 261 (RL-0308). The quoted language, however, does not appear in that case.

[1800] Clms' Mem. ¶¶ 329 – 337.

expropriation scenario … unlawful expropriations and other treaty breaches have to be compensated pursuant to the principle of full reparation under customary international law, reflected in the Chorzów Factory case."[1801]

618. The decisions in, inter alia, Siemens v. Argentina,[1802] Vivendi v. Argentina,[1803] Biwater v. Tanzania,[1804] Saipem v. Bangladesh,[1805] Karkey Karadeniz v. Pakistan,[1806] and UP & CD Holding v. Hungary,[1807] thus represent the predominant approach followed by arbitral tribunals, i.e., that "full reparation" is the applicable standard for unlawful expropriations. As the UP & CD Holding v. Hungary tribunal remarked:

> The Tribunal does not agree with Respondent's view that, while accepting a distinction between lawful and unlawful expropriation, it is 'both necessary and logical' that the compensation rules of Art. 5(2) should apply to both lawful and unlawful expropriation. It is by no means 'logical' that a breach of Art. 5(2) by an unlawful dispossession should not result in any wider liability than a lawful dispossession. Most legal systems, though by different terminology and criteria, distinguish between a 'compensation' for lawful measures and a liability for 'damages' as a result for unlawful measures. As Claimants correctly argue, Art. 5(2) contains an express lex specialis for lawful expropriation. *Indeed, as confirmed in investment jurisprudence, including ADC v. Hungary, unless a treaty contains a clear reference to damages due for unlawful expropriation, the compensation rule referred to in the BIT will only apply to lawful expropriation, with damages for unlawful expropriation being governed by customary international law.* The compensation rule prescribed in Art. 5(2) of the BIT, therefore, does not apply to unlawful expropriation.[1808]

619. As thus shown, Respondent's arguments concerning the appropriate standard of compensation for unlawful expropriation under the DR-CAFTA suffer from numerous flaws and are not reflective of contemporary international investment law practice.

[1801] BORZU SABAHI, NOAH RUBINS, ET AL., INVESTOR-STATE ARBITRATION 717-718 (2d ed., 2019) (CL-0299).

[1802] *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award dated 6 Feb. 2007 ¶¶ 352, 353 (CL-0159).

[1803] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award dated 20 Aug. 2007 ¶¶ 8.2.3–8.2.5 (CL-0142).

[1804] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated 24 July 2008 ¶ 775 (CL-0085).

[1805] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award dated 30 June 2009 ¶ 201 (CL-0145).

[1806] *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award dated 22 Aug. 2017 ¶¶ 662-664 (CL-0217).

[1807] *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award dated 9 Oct. 2018 ¶¶ 511-512, 560 (CL-0141).

[1808] *Id.* ¶ 511 (emphasis added and original emphasis omitted).

B. The Valuation Date Chosen By Claimants Is Necessary To Wipe Out The Consequences Of Respondent's Breach

620. As detailed in the Memorial, the valuation date chosen by Claimants (*i.e.*, the date of the Award) is necessary to wipe out the consequences of Respondent's Treaty breaches.[1809] In its Counter-Memorial, Respondent disputes this, arguing for an *ex ante* valuation date of 5 May 2016 or, in the alternative, of 11 November 2015.[1810] This is incorrect.

621. In this case, the principle of full reparation requires the valuation date to be the date of the Award,[1811] because this case concerns an unlawful expropriation along with other breaches, and the value of the investment has increased between the date of the Treaty breaches and the date of the Award. In *ConocoPhillips v. Venezuela*, the tribunal held that "if the taking was unlawful, the date of valuation is *in general the date of the award*."[1812] It is also recognized that in cases of unlawful expropriations, "the claimant has the right to choose the valuation date"[1813] and that:

> investors must enjoy the benefits of unanticipated events that increase the value of an expropriated asset up to the date of the decision, because they have a right to compensation in lieu of their right to restitution of the expropriated asset as of that date. If the value of the asset increases, this also increases the value of the right to restitution and, accordingly, the right to compensation where restitution is not possible.[1814]

622. Tested against these principles, the present case is a clear one, where there has been an increase in the value of the investment post-taking, including on account of the increase in gold

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[1809] Clms' Mem. ¶¶ 334-337.

[1810] Resp's C-M ¶¶ 833-837.

[1811] Clms' Mem. ¶ 334 (citing cases); *see also Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award dated 7 Feb. 2017 ¶ 326 (CL-0303); *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Award dated 24 Apr. 2019 ¶ 831 (CL-0304); *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case No. ARB/05/18, Award dated 3 Mar. 2010 ¶ 514 (CL-0163); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award dated 21 July 2017 ¶ 1115 (CL-0305); *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award dated 4 Apr. 2016 ¶ 843 (CL-0153); *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award dated 16 Sept. 2015 ¶ 370 (CL-0226).

[1812] *ConocoPhillips Petrozuata B.V.* et al. *v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits dated 3 Sept. 2013 ¶ 343 (CL-0306) (emphasis added).

[1813] IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW 3.298 (2d ed., 2017) (CL-0247); *Yukos Universal Ltd. (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award dated 18 July 2014 ¶¶ 1763, 1769 (CL-0180) ("[I]n the case of an unlawful expropriation . . . Claimants are entitled to select either the date of expropriation or the date of the award as the date of valuation.").

[1814] *Yukos Universal Ltd. (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award dated 18 July 2014 ¶ 1767 (CL-0180) (emphasis omitted).

price.[1815] Respondent does not deny this significant fact, nor does it present any justification for having Respondent benefit from this increase when, absent its own unlawful conduct, Claimants would have benefitted. The United States' concern expressed in its NDP submission that valuing the investment as of the date of the Award may run afoul of international law by ignoring causation, foreseeability, or "punish[ing] States"[1816] is wrong.

623. Indeed, in *Quiborax v. Bolivia*, the tribunal considered that the higher price of the mineral resource at issue (ulexite) post-expropriation should be considered in the quantification of damages, holding that price fluctuations are "foreseeable."[1817] Likewise, the *Burlington v. Ecuador* tribunal properly rejected the argument that choosing a valuation date as of the date of the Award presents a causation problem:

> [T]he fact that some of the information used to quantify lost profits on the date of the award may not have been foreseeable on the date of the expropriation does not break the chain of causation. What matters is that the injury suffered must have been caused by the wrongful act. It is true that factual causation is not sufficient, and that an additional element linked to the exclusion of injury that it is too remote or indirect (sometimes referred to as legal or adequate causation) is required, and it is in this context where foreseeability plays a role …. [I]t is generally accepted that the expropriation of a going concern is objectively capable of causing the loss of its future profits stream, and thus this loss is foreseeable. *It is also foreseeable that these future profits may fluctuate depending on various economic and other variables including prices*, costs, inflation and interest rates, among others.[1818]

624. Exmingua's value but-for the measures would also have been greater as of the date of the Award as compared with 2016 or 2015, because, as both SRK and Versant explain, Claimants would have had the opportunity to further advance the Project by conducting further exploration and continuing to mine.[1819] Having deprived Claimants of this opportunity, Guatemala should not be

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[1815] Versant I ¶¶ 125-126, Figure 9.

[1816] US NDP Submission ¶ 62.

[1817] *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award dated 16 Sept. 2015 ¶ 383 (CL-0226).

[1818] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award dated 7 Feb. 2017 ¶ 333 (CL-0303) (emphasis added); *see also Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award in Resubmitted Proceeding dated 5 June 1990 ¶ 186 (CL-0307) ("Foreseeability not only bears on causation rather than on quantum, but it would anyway be an inappropriate test for damages that approximate to restitution in integrum. The only subsequent known factors relevant to value which are not to be relied on are those attributable to the illegality itself.") (emphasis omitted).

[1819] *See* SRK II ¶¶ 69, 90; Versant II ¶¶ 66-73; SRK I ¶¶ 96-99, 114-115; Versant I ¶¶ 18, 100, 106, 109; Clms' Mem. ¶¶ 364-365.

allowed to benefit – and Claimants should not be penalized – by having their investment valued as at an *ex ante* date.

625. Yet another reason for applying the date of the Award as the valuation date, as Versant points out, is that Claimants had no intention of selling the Tambor Project in 2016[1820] and would *not* have accepted the value that Mr. Rosen calculates as of that time,[1821] which thus cannot be considered a "fair market value" calculation. Guatemala's quantum expert, Mr. Rosen, is familiar with this line of reasoning, as he himself opined in the *Clayton* matter that:

> Absent the Respondent's breaches of the Treaty, the Investors intended to develop and make use of the Whites Point project. Changing the standard of compensation from full reparations to an undefined notion of 'value' assumes that the Investors intended to put the Whites Point project up for sale and would, absent the Respondent's breaches of the Treaty, potentially accept a price different than the present value of the profits they could receive by operating the project themselves.[1822]

626. Respondent's argument for an *ex ante* valuation date thus is unsustainable. It results from Respondent's mistaking the provisions in Article 10.7.2 as a standard of compensation (rather than a condition for legality of an expropriation), which is in any case inapplicable to unlawful expropriation, and Respondent's failure to deal with Claimants' submissions regarding the appropriate standard of compensation for Respondent's non-expropriatory Treaty breaches.[1823] The valuation date chosen by Respondent (*i.e.*, 5 May 2016 or 11 November 2015) would lead to damages representing a fraction of the losses incurred by Claimants and, hence, is inconsistent with the applicable standard of full reparation.

C. Respondent's Breaches Caused The Damages Incurred By Claimants

1. There Is a Clear Causal Link Between Respondent's Treaty Violations and Claimants' Losses

627. Claimants' losses have indisputably been caused by Respondent's breaches of the DR-CAFTA and, as a matter of international law, Respondent owes full reparation to make Claimants whole. Contrary to Respondent's assertion that Claimants "must surpass the *high threshold* of

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[1820] Kappes II ¶¶ 59, 71.

[1821] Versant II ¶¶ 53, 59.

[1822] *William Ralph Clayton,* et al. *v. Government of Canada*, UNCITRAL, Reply Expert Report of Mr. Howard Rosen dated 23 Aug. 2017 ¶¶ 4.4-4.7 (C-0776).

[1823] *See supra* §§IV.A-IV.B.

proving the existence of direct and sufficient causation between the contested measures and the damage claimed,"[1824] the existence of damage, like any other fact, must be established on a balance of probabilities.[1825] As for causation – that is both factual and legal in nature. Factual causation requires the wrongful conduct to have "played *some* part in bringing about the harm or injury."[1826] The claimant thus needs to show that it would not have sustained the injury "but for" the respondent's breach.[1827] Legal causation, on the other hand, "operates to filter out harms that were 'too remote' from the alleged breach, were 'not proximate' to the wrongful act, or in the formulations of some tribunals, were not 'foreseeable.'"[1828] Contrary to Respondent's contentions, and as Claimants demonstrate below, both of these tests are satisfied in the present case.

628. As the tribunal in *Lemire v. Ukraine* set out, "[i]f it can be proven that in the normal cause of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists, and that the first is the proximate cause of the other."[1829] Moreover, this causal link need not be direct, but can be established through a chain of connected events, provided that there is "no [break] in the chain [of causation] … [a]ll indirect losses are covered provided only that in the legal contemplation [the state's] act was the efficient and proximate cause and the source from which they flowed."[1830] In assessing legal causation, the time between the harm suffered and the State's wrongful conduct is also considered.[1831]

[1824] Resp's C-M ¶ 851 (emphasis added).

[1825] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award dated 22 Sept. 2014 ¶ 685 (CL-0205) ("The Tribunal finds no support for the conclusion that the standard of proof for damages should be higher than for proving merits, and therefore is satisfied that the appropriate standard of proof is the balance of probabilities.").

[1826] SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 135 (2008) (CL-0234) (emphasis in original).

[1827] *See, e.g., LG&E Energy Corp.* et al. *v. Argentine Republic*, ICSID Case No. ARB/02/1, Award dated 25 July 2007 ¶ 48 (CL-0237); *William Ralph Clayton,* et al. *v. Government of Canada*, UNCITRAL, Award on Damages dated 10 Jan. 2019 ¶ 114 (CL-0243) (holding that the test is whether the tribunal is "able to conclude from the case as a whole and with a sufficient degree of certainty" that the damage or losses "would in fact have been averted if the Respondent had acted in compliance with its legal obligations.").

[1828] Patrick W. Pearsall & J. Benton Heath, *Causation and Injury in Investor-State Arbitration, in* CONTEMPORARY AND EMERGING ISSUES ON THE LAW OF DAMAGES AND VALUATION IN INTERNATIONAL INVESTMENT ARBITRATION (CHRISTINA BAHARRY ED., 2018) 11 (CL-0308).

[1829] *Joseph Charles Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Award dated 28 Mar. 2011 ¶ 169 (CL-0246). *See also*, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Excerpts of Award dated 18 Apr. 2017 ¶ 269 (CL-0309).

[1830] *Joseph Charles Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Award dated 28 Mar. 2011 ¶ 166 (CL-0246).

[1831] *See, e.g., Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Award dated 22 May 2007 ¶¶ 371-375 (CL-0259) (observing that "[i]t was only after the [measures complained of] that the company defaulted on its debt and the stock exchange price decreased dramatically" and "[c]onsequently, the decrease in value was generated by the measures and not by the leverage"); *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. The Republic of Kazakhstan*, SCC Case No. V 116/2010, Award dated 19 Dec. 2013 ¶ 1356 (CL-0310) (finding that "Claimants' investment proceeded in a more or less normal fashion before" the unlawful measures by the state).

629. Here, Respondent has no basis to question either factual or legal causation. Prior to the suspension of Exmingua's exploitation license, the mine had been operating for over 1.5 years. The operation was proceeding as planned; in fact, the gold grade was higher than some testing had indicated, the plant was increasing its recovery rate, mining was expanding, and Exmingua had a long-term marketing agreement for the sale of its concentrate.[1832] Exmingua, moreover, had legitimate confidence that it would obtain a Santa Margarita exploitation license,[1833] and Guatemala's measures ensured that Claimants were unable to capitalize on their opportunity to develop Santa Margarita's potential.[1834]

630. The damages accruing to Claimants were caused by the forced indefinite suspension of Exmingua's Progreso VII exploitation license, the *de facto* suspension of its Santa Margarita exploration license and *de facto* moratorium on issuing exploitation licenses, and the unlawful seizure of Exmingua's concentrate. Specifically, the damages suffered by Claimants as a result of not being able to mine, having Exmingua's concentrate impounded for over four years, and being unable to obtain an exploitation license for Santa Margarita are directly attributable to:

- the MEM's indefinite, unlawful, arbitrary, and discriminatory suspension of Exmingua's Progreso VII license, which forms the basis for Claimants' expropriation, FET, NT and MFN claims;
- the courts' unlawful, arbitrary, and discriminatory suspension of Exmingua's Progreso VII license, which forms the basis for Claimants' expropriation, denial of justice, NT and MFN claims;
- the MEM's arbitrary, discriminatory, and bad faith failure to conduct the court-ordered consultations, which forms the basis for Claimants' expropriation, FET, NT, and MFN claims;
- the MEM's arbitrary and bad faith refusal to provide assistance or guidance to Exmingua for conducting the consultations for the Santa Margarita EIA and imposing and refusing to rescind the arbitrary and bad faith 30-day deadline for submission of the completed EIA, in accordance with the State's *de facto* moratorium on issuing exploitation licenses, which forms the basis for Claimants' expropriation and FET claims; and
- Respondent's failure to provide security to enable Exmingua to carry out the social studies for its Santa Margarita exploitation license application, which forms the basis for Claimants' FPS claim.

[1832] Clms' Mem. ¶¶ 376, 64-65, 4.

[1833] *See supra* § II.D.3; Fuentes II ¶ 98-99; Fuentes I ¶ 81.

[1834] Clms' Mem. ¶¶ 242-249.

The damages emanating from these measures would not have been incurred "but for" Respondent's actions, and it is difficult to comprehend how Respondent could question the obvious and, certainly, the "sufficiently clear link"[1835] between its actions and Claimants' injury.

631. The cases Respondent relies on to reach a contrary conclusion are unavailing, as most dealt with a situation where there was an intervening or other event that precluded a finding of causation, and can hardly be said to be decisions arising from the "same circumstances":[1836]

- In *Costa Rica v. Nicaragua*, the ICJ did not find a causal link between the reduced flow of the Colorado river and Nicaragua's dredging activities, because Costa Rica admitted that "other factors may be relevant to the decrease in flow, most notably the relatively small amount of rainfall in the relevant period."[1837] Here, Respondent has not even attempted to point to any "other factors" that may have caused the damages incurred by Claimants.

- In *Biwater v. Tanzania*, the tribunal held that, as of the date of expropriation, the claimant's "investment was of no economic value,"[1838] and so found that "the actual, proximate or direct causes of the loss and damage" was not Tanzania's treaty breaches.[1839] In swiftly rejecting reliance on the *Biwater* decision, the *Lemire v. Ukraine* tribunal explained that "[i]n *Biwater* [the] claimant's damages were the consequence of the *desperate financial condition which claimant had put itself into, prior to the violation of the BIT*. In [*Lemire v. Ukraine*], the first violation of the BIT took place . . . at a time when Gala Radio was a successful radio operator and a leader in its field. Thus, Claimant's damages, its loss of business, can in *no way be due to the situation in which Claimant found himself immediately prior to the violation of the BIT*."[1840] So too here. Claimants were successfully operating a gold mine at Progreso VII and, absent Respondent's measures, would have continued to do so, along with developing the untapped potential of Santa Margarita.

- *Lauder v. Czech Republic* concerned an investment in CME, which had invested in a Czech company, CNTS, that held an exclusive broadcasting license. The Czech Media Council adopted a series of measures in collaboration with Dr. Železný, the General Director of CNTS, that led to CNTS losing the license and caused damages to CME. The tribunal found that the "real cause for the damage" incurred by the investor was the conduct of Dr. Železný, which was not attributable to the Czech

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[1835] *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/5 NAFTA, Award (Redacted Version) dated 21 Nov. 2007 ¶ 282 (CL-0195).

[1836] Resp's C-M ¶ 853.

[1837] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, ICJ REPORTS 2015, (Judgment of 16 Dec. 2015) ¶ 119 (CL-0373).

[1838] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award dated 24 July 2008 ¶ 792 (CL-0085).

[1839] *Id.* ¶ 798.

[1840] *Joseph Charles Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Award dated 28 Mar. 2011 ¶ 211 (CL-0246) (emphasis added).

Republic.[1841] The tribunal's observations regarding remoteness of damages arose from its finding that, although the Czech Republic had violated the BIT in 1993, the harm was inflicted *six years later* through the intervening acts of Dr Železný and thus was "too remote" to be sufficiently connected to the breach.[1842] Respondent has not demonstrated any intervening factors, and its observations regarding remoteness are thus inapplicable.

- In *Spółdzielnia Pracy Muszynianka v. Slovakia*, the tribunal held that the claimant was not entitled to damages allegedly suffered as a result of a permit denial, because that permit denial itself did not breach the treaty. The permit was denied on the basis of a constitutional amendment, and it was the State's delay in issuing the decision denying the permit, and carrying out its decision-making in "wilful disregard" of local administrative law and a lack of transparency that was found to violate the FET standard.[1843] Accordingly, the *Muszynianka* tribunal held that "but for" the breach, the claimant *still* would have been denied the permit.[1844] The delay in the denial, moreover, was not the proximate cause of any damage. Here, by contrast, absent the challenged measures, Exmingua would be operating the mine, it would have exported its concentrate, and it would have obtained an exploitation license for Santa Margarita.[1845]

632. Claimants thus have established both as a matter of fact and as a matter of law, that their damages are causally connected to Respondent's Treaty breaches.

2. Claimants' Damages Claim Is Consistent With The Decision On Preliminary Objections

633. In their Memorial, Claimants quantified the damages that they had suffered as a result of Respondent's Treaty violations. Specifically, they demonstrated that the value of Exmingua was decimated as a result of Respondent's measures, insofar as Exmingua can no longer operate and, thus, has ceased generating any income as a result of its mining operations; it has *de facto* been denied an exploitation license for Santa Margarita; and its assets, in the form of its concentrate, were unlawfully impounded.[1846] As such, Exmingua has now been rendered worthless. Claimants further explained that, in the case of an expropriation, it is the shareholders who suffer losses equivalent to the value of

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[1841] *Lauder v. The Czech Republic*, UNCITRAL, Award dated 3 Sept. 2001 ¶ 234 (CL-0186); *see also CME Czech Republic B.V. v. Czech Republic,* UNCITRAL, Partial Award dated 13 Sept. 2001 ¶¶ 575-585 (CL-0052) (finding a causal link between the damages incurred by claimant and the Czech Republic's measures).

[1842] *Lauder v. The Czech Republic*, UNCITRAL, Award dated 3 Sept. 2001 ¶ 235 (CL-0186).

[1843] *Spółdzielnia Pracy Muszynianka v. The Slovak Republic*, PCA Case No. 2017-08, Award dated 7 Oct. 2020 ¶¶ 612-616 (RL-0255).

[1844] *Id.* ¶¶ 618-619.

[1845] While Guatemala asserts that the claimant in the *Muszynianka* case "had no entitlement nor legitimate expectation to the Exploitation Permit," (Resp's C-M n. 1577) Claimants have demonstrated that, absent the measures, Exmingua had legitimate confidence that it would obtain an exploitation license for Santa Margarita. *See supra* II.D.3; Fuentes II ¶ 98-99; Fuentes I ¶ 81.

[1846] Clms' Mem. ¶¶ 167, 363-364.

their expropriated investment; the expropriated investment, as such, does not suffer any distinct harm. With respect to damage incurred for Treaty breaches aside from expropriation, on the facts of this case, those violations also had the effect of depriving Claimants of the totality of the value of their investment in Exmingua.[1847] In any event, even if Claimants' damages were deemed to be derivative of Exmingua's losses, because Claimants are Exmingua's sole owners and Exmingua had no third-party debt, Claimants explained that the loss in Exmingua's value equates to the loss in value of Claimants' shares in Exmingua.[1848]

634. In its Counter-Memorial, Guatemala accuses Claimants of "disregard[ing] [the] principles and precepts" set forth in the Tribunal's Decision on Preliminary Objections (the "Decision") and "claiming damages that contradict the decisions already made by the Tribunal."[1849] In doing so, Guatemala distorts the Tribunal's Decision, as well as Claimants' damages claim. The United States, in its submission, goes even further, by challenging the Tribunal's Decision itself and indirectly seeking its reversal.[1850] These arguments cannot stand.

635. *First*, Guatemala's assertion that Claimants have wrongly equated their damages with Exmingua's value[1851] is incorrect. Claimants are seeking damages for the loss in value of the *entirety* of their investment. Even the United States, which has long maintained its opposition to reflective-loss claims and inappropriately reprises that stance in its non-disputing party submission, confirms that an "example of a *direct* loss or damage suffered by shareholders is where the disputing State wrongfully expropriates the shareholders' ownership interests – whether directly through an expropriation of the shares *or indirectly by expropriating the enterprise as a whole*."[1852] Likewise, Arbitrator Douglas confirmed in his Partial Dissent to the Decision that "even on my reading of Article 10.16.1, the Claimants would not be prevented from pursuing their claim for the expropriation of their shares in Exmingua because such a claim is cognizable under Article 10.16.1(a)—it is a claim to vindicate their legal rights as shareholders rather than their mere economic interest in the value of Exmingua's shares."[1853]

[1847] *Id.* §§ III.B.3, III.C, III.D and III.E.

[1848] *Id*. ¶ 363.

[1849] Resp's C-M ¶ 854.

[1850] *See* US NDP Submission ¶¶ 50-62.

[1851] Resp's C-M ¶ 857.

[1852] US NDP Submission ¶ 55 (emphasis added).

[1853] Partial Dissenting Opinion of Prof. Zachary Douglas QC ¶ 28; *see also William Ralph Clayton,* et al*. v. Government of Canada,* UNCITRAL, Award on Damages dated 10 Jan. 2019 ¶ 396 (CL-0243) (holding that the opportunity to invest in a quarry and a marine terminal belonged to "*the Investors and [was] not an opportunity of Bilcon of Nova Scotia*.

636. *Second*, even if Claimants' claim was not for the expropriation of their shares in Exmingua – which it is – Claimants' damages claim comports with the Tribunal's Decision. Respondent quotes the Tribunal's Decision, holding that "the claimant itself must have 'incurred' harm; it would not be sufficient for a claimant to demonstrate only that a local enterprise in which it has an interest has incurred harm,"[1854] and that Claimants should show "how and to what extent [they] could have incurred harm as a result of the company's damage (e.g., as a result of non-payment of expected dividends or decrease in the market value of the shares)."[1855] Claimants, however, *have* shown that they themselves have incurred harm as a result of Guatemala's internationally unlawful measures. Claimants have shown harm "as a result of the company's damage," and, more specifically, as a "decrease in the market value of the [investment's] shares."[1856]

637. While it was operating, Exmingua had not paid dividends; instead, it reinvested the revenue it generated into the mining operations.[1857] Claimants thus have calculated their losses as a decrease in the market value of their shares in Exmingua (which, in any event, would be equivalent to the dividends that would be distributed to Claimants in the but-for scenario and if Exmingua was liquidated). Because Claimants own 100% of Exmingua, the value of Claimants' shares in Exmingua is a reflection of the value of Exmingua itself.[1858]

638. Although the Tribunal observed, and Respondent emphasizes, that a shareholder's losses "*may* be both harder to prove and lower in amount than the enterprise's own direct losses," because there "*can* be significant hurdles" in demonstrating upstream injury to shareholders for downstream harm,[1859] the factors that create such "hurdles" are simply *not present* in this case. As Versant has explained, "[i]n the present case, Claimants own a 100% equity interest in the Tambor Project. Because Exmingua did not have any third-party debt or loan obligations as of the Valuation Date, Claimants' 100% equity ownership interest in Exmingua is equal to 100% of the enterprise value of the Tambor Project as of the Valuation Date."[1860] Therefore, the concerns regarding the proper

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Accordingly, compensation is owed *directly* to the Investors pursuant to [the article providing that an investor may file a claim on its own behalf].") (emphasis added).

[1854] Decision on Prelim. Obj. ¶ 129 (quoted in Resp's C-M ¶ 855).

[1855] Resp's C-M ¶ 856 (quoting Decision on Prelim. Obj. ¶ 132).

[1856] *See* Clms' Mem. ¶¶ 362-365.

[1857] Kappes I ¶ 120 ("The proceeds from [Exmingua's concentrate] sales went directly into Exmingua's Guatemalan bank accounts and, after taxes were paid, were used in Guatemala to cover the costs of mining and production.").

[1858] Clms' Mem. ¶ 363.

[1859] Decision on Prelim. Obj. ¶ 148 (emphasis added); *Id.* n. 142; *see also* Resp's C-M ¶ 842.

[1860] Versant I ¶ 79.

calculation of Claimants' damages to ensure "accounting for any claims by Exmingua's creditors"[1861] simply do not apply here.

639. Investment tribunals thus properly calculate investors' damages as the loss in cashflows from their investment, adjusted for any company debt:

> [I]n a shareholder claim in respect of a state measure taken vis-à-vis the company, the cash flow impacted by the measure is in principle always the same, i.e., the company's cash flows. The different valuation methodologies seek to i) determine the damage caused by the challenged measures, excluding other factors, by comparing the real scenario (which may include estimations in respect of future periods) and a hypothetical scenario in which these measures are not present, and ii) calculate what portion of the damage corresponds to the shareholder claimant. Yet even if calculated as the diminution of the value of the claimant's shareholding–by somehow deducting the debt, etc.–the damage caused by the measures is always the same. … In the final analysis, after often complex calculations, in both cases the shareholder's value will consist of the company's expected cash flows minus the debt.[1862]

In the recently published *Sutter v. Madagascar* award, the tribunal accordingly awarded the claimants damages equal to the amount of their investment (which was destroyed by rioters, in breach of the treaty's obligation to provide full protection and security), because the only debt held by the investment was owed to companies owned by the claimants.[1863] Because Exmingua has no debt,[1864] there are no "complex calculations" required in this case, and Claimants' losses likewise consist of Exmingua's value but-for the measures.

640. Respondent's reliance on *Nykomb v. Latvia* to argue that Claimants' losses cannot be equated with those of Exmingua's because "the reduced flow of income into [the investor company] obviously does not cause an identical loss for [its shareholder] as an investor"[1865] does not assist it. As noted, simply stating that in every case the loss to the company will not equate to the loss to the shareholder says nothing about *this* case. And the *Nykomb* tribunal's decision on damages has been roundly criticized for lacking *any* rationale; as Arbitrator Douglas observed in his Partial Dissent to the Decision, "the [*Nykomb*] tribunal simply divided the company's income by a factor of 3 to quantify

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[1861] Decision on Prelim. Obj. ¶ 118 and n. 177.

[1862] GABRIEL BOTTINI, THE ADMISSIBILITY OF SHAREHOLDER CLAIMS: STANDING, CAUSES OF ACTION, AND DAMAGES 159-160 (2017) (CL-0374); *see also* MARK KANTOR, VALUATION FOR ARBITRATION 197 (CL-0066) ("If the issue before the arbitrators involves measuring the loss of value suffered by an equity investor as a consequence of injury to the underlying business, then the 'equity' valuation is clearly the proper measure of the company's value.").

[1863] *(DS)2, S.A., Monsieur Peter de Sutter et Monsieur Kristof de Sutter v. République de Madagascar*, ICSID Case No. ARB/17/18, Award dated 17 Apr. 2020 ¶¶ 406-407 (CL-0311).

[1864] *Id.* ¶ 407.

[1865] Resp's C-M ¶ 856.

the shareholder's reflective loss. No justification was given for that figure. It was plucked straight from the stratosphere,"[1866] which certainly is not a position to be endorsed and followed in this case.

641. *Third*, Respondent faults Versant for failing to "apply any corporate tax or tax withholding to past earnings" in calculating Claimants' damages.[1867] However, as Versant explains, deducting taxes from Exmingua's historical lost profits would lead to double taxation.[1868] Contrary to Guatemala's and its expert's assertions,[1869] Versant shows that calculation of lost profits on a pre-tax basis is "widely-accepted."[1870] Furthermore, Claimants' damages calculation includes taxes on projected future cash flows (*i.e.*, lost value), making its calculation more conservative than if it had followed an approach of grossing up the damages claim to account for taxes.[1871] With respect to withholding tax, even though Claimants intended to reinvest the profits into Exmingua's operations and, thus, would not have paid withholding taxes, Versant includes these taxes when calculating the free cash flow from the mine.[1872]

642. *Finally*, in its non-disputing party submission, the United States inappropriately attempts to re-litigate the issue of reflective loss, as decided by the Tribunal in its Decision.[1873] As the Tribunal is aware, the United States chose not to make any submission at the preliminary objections phase;

[1866] Partial Dissenting Opinion of Prof. Zachary Douglas QC ¶ 23.

[1867] Resp's C-M ¶ 868.

[1868] Versant II ¶¶ 178-190; Versant I ¶ 135; *see also*, Robert P. Schweihs, *Measuring Lost Profits Economic Damages on a Pretax Basis*, WILLAMETTE 11-12 (2010) (C-0240) ("[A] pretax lost profits analysis results in an economic damages award that restores the damaged party to its same economic condition 'but for' the damages event."); Alexander Demuth, *Income Approach and the Discounted Cash Flow Methodology*, *in* GAR THE GUIDE TO DAMAGES IN INTERNATIONAL ARBITRATION (John Trenor ed.) (CL-0289) ("Whereas business valuation typically considers after-tax results, damages are generally determined on a pre-tax basis, assuming that any compensation will be taxed at the level of the damaged party."); MARK KANTOR, VALUATION FOR ARBITRATION 192-193 (2008) (CL-0066) ("[M]any experts prefer to employ pre-tax amounts and discount rates…. [i]t is of course important to remind an expert witness using the after-tax method to gross-up the resulting lower present value cash flow amount for income taxes. Otherwise, the successful claimants will be paying income tax on the compensation award, which itself was reduced on account of that taxation – an obvious instance of double counting."); Richard A. Pollack, *Calculating lost profits; Practice aid 06-4, in* AICPA BUSINESS VALUATION AND FORENSIC AND LITIGATION SERVICES SECTION, GUIDES, HANDBOOKS AND MANUALS ¶ 130 (2006) (C-0777) ("In general, lost profits damages are taxable as ordinary income to the party to which damages are paId. Also, generally, whether received as a result of legal judgment or settlement, tax treatment is the same for lost profits damages. As such, lost profit calculations are typically prepared on a pretax basis.")

[1869] Resp's C-M ¶¶ 868, 874, 900; Secretariat ¶ 250.

[1870] Versant II ¶¶ 178-190.

[1871] *Id.* ¶ 189.

[1872] *Id.* ¶ 193.

[1873] *See* US NDP Submission ¶ 50 ("recogniz[ing]" that the Tribunal has already ruled on the issue of reflective loss, and stating that it "nonetheless feels compelled to provide its views" on that previously-decided issue); *cmp., e.g., Id.* ¶ 57 ("In sum, Article 10.16.1(a) adheres to the principle of customary international law that *shareholders may assert claims only for direct injuries to their rights*.") (emphasis added) *with* Decision on Preliminary Objections ¶ 157 ("Article 10.16.1(a), the text [the DR-CAFTA State Parties] adopted contains no language suggesting that it be interpreted other than through the ordinary meaning of its terms – and the particular terms adopted are not consistent with barring a claimant from pursuing 'on its own behalf' a claim for losses it 'incurred,' just because those losses may have been incurred indirectly rather than directly.").

nevertheless, its well-rehearsed position on reflective loss was invoked and relied upon by Guatemala,[1874] and rejected by the Tribunal.[1875] Regardless, it is far too late for the United States to urge this Tribunal to reject the notion that claims for reflective loss are cognizable under the DR-CAFTA. The Tribunal determined otherwise in its Decision, which remains the law of the case.

3. Respondent Has Failed To Establish Any Contributory Negligence Or Fault That Would Warrant A Reduction Of Damages

643. Relying on two *dissenting* opinions in other cases, Guatemala urges the Tribunal to reduce Claimants' damages by "no less than 50%," on the purported basis that "the investor's responsibilities are no less than those of the government."[1876] In support of its unwarranted and arbitrary claim, Respondent argues that Claimants allegedly failed to "elaborate on and determine" the legal effect of the ILO Convention 169 on the Tambor Project.[1877] Guatemala further asserts that Claimants purportedly failed to "carry out human rights due diligence" and to obtain a "social license," and proceeded on the assumption that "consultations with indigenous peoples would never be required to continue exploration and exploitation of the mine in the areas covered by their licenses."[1878] Guatemala has failed to establish any contributory fault on the part of Claimants, or any basis for an arbitrary 50% reduction in Claimants' damages.

644. Respondent argues that "Claimants' contributory negligence or fault would absolve Guatemala of any liability, or at least reduce the damages claimed by Claimants…,"[1879] without appreciating that contributory fault is not established by mere assertion. In order to prove contributory fault, Respondent must discharge the twin burdens of establishing (i) that Claimants committed a willful or negligent act, and (ii) that such fault interrupted the chain of causation.[1880] Respondent's arguments fail on both counts.

[1874] *See, e.g.*, Resp's Prelim. Obj. Mem. nn. 44, 86 (citing the US NDP submissions in *Bilcon v. Canada* and *Renco v. Peru*); Resp's Prelim. Obj. Reply ¶¶ 66-68, 72 (citing US NDP submissions); Prelim. Obj. Hearing Tr. (16 Dec. 2019) 09:40:17–09:41:53 (discussing US NDP submission in *Clayton v. Canada*).

[1875] *See* Decision on Prelim. Obj. ¶¶ 130, 136, 141, 157.

[1876] Resp's C-M ¶ 864 (citing Partial Dissenting Opinion of Prof. Philippe Sands in *Bear Creek v. Peru*, and Dissenting Opinion of Prof. Stern in *Occidental v. Ecuador* (partially annulled on other grounds)).

[1877] Resp's C-M ¶ 861.

[1878] Resp's C-M ¶ 863.

[1879] *Id.* ¶ 858.

[1880] *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States,* ICSID Case No. ARB(AF)/09/2, Award dated 18 Apr. 2013 ¶ 670 (CL-0165); *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award dated 30 Nov. 2017 ¶ 410 (CL-0139).

645. As the commentary to Article 39 of the Articles on State Responsibility elaborates, only "those actions or omissions which can be considered wilful or negligent, *i.e.* which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights" can be taken into account.[1881] In terms of the degree of fault, "[a] mere *contribution* to causation is…not sufficient," the contribution must be "material and significant."[1882] Arbitral tribunals, in fact, have emphasized that "quite a *significant contribution* to fault is required for any damages reduction to be appropriate."[1883] Rather, the action or omission should constitute "negligent or reproachable behavior."[1884] Accordingly "[a]rbitral practice seems to apply this criterion [of contributory negligence] rather restrictively,"[1885] and Guatemala's assertion that investment arbitration "precedents are *abundant* on this subject"[1886] is plainly incorrect.

646. Respondent has failed to prove that Claimants committed any willful or negligent act that interrupted the chain of causation. As shown above, Claimants conducted appropriate and proper due diligence before investing in Exmingua.[1887] Despite arguing at length that Claimants should have "determine[d]" the legal effect of ILO Convention 169 on the Project, Guatemala is unable to point to a single thing that Claimants could have "determine[d]" or discovered. This is unsurprising, as Claimants have shown that, right until Guatemala indefinitely suspended Exmingua's license, Guatemala had shared Claimants' interpretation of ILO 169. As discussed, among other things, Guatemala repeatedly declared before the IACHR that community consultations conducted in accordance with its Mining Law and regulations satisfied the State's international obligations.[1888]

[1881] ILC Articles, Article 39, Commentary ¶ 5 (CL-0123); *see also*, *Perenco Ecuador Ltd. v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Award dated 27 Sept. 2019 ¶ 344 (CL-0312).

[1882] IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW ¶¶ 3.242-3.243 (2d ed., 2017) (CL-0247) (emphasis added); *see also* Commentary to ILC Articles, Art. 39 (CL-0123); *Occidental Petroleum Corp. and Occidental Exploration and Prod. Co. v. Republic of Ecuador,* ICSID Case No. ARB/06/11, Award dated 5 Oct. 2012 ¶ 670 (CL-0314) (partially annulled on other grounds); *Gemplus v. United Mexican States*, ICSID Case No. ARB (AF)/04/03 & ARB(AF)/04/4, Award dated 16 June 2010 ¶ 11.12 (CL-0155); *Yukos Universal Ltd. (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award dated 18 July 2014 ¶ 1600 (CL-0180); *Caratube Int'l Oil Co. LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award dated 27 Sept. 2017 ¶¶ 1192-1195 (CL-0315).

[1883] J. Kalicki, M. Silberman, *et al*., *'What Are Appropriate Remedies for Findings of Illegality in Investment Arbitration?'*, *in* INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY 734 (Andrea Menaker ed., 2017) (CL-0336).

[1884] IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW ¶ 3.243 (2d ed. 2017) (CL-0247).

[1885] *Id*; *see also*, Irmgard Marboe, *Case comment – Yukos Universal Limited (Isle of Man) v. The Russian Federation: Calculation of Damages in the Yukos Award: Highlighting the Valuation Date, Contributory Fault and Interest*, 30 ICSID REV. 2, 333 (2015) (CL-0337) ("[f]indings on contributory fault are still *rather infrequent*.") (emphasis added).

[1886] Resp's C-M ¶ 860.

[1887] *See supra* § II.A.1.

[1888] Clms' Mem ¶¶ 81, 83; *see supra* § II.B.

There thus was nothing that Claimants could have "discovered" with additional due diligence. Respondent's further assertions that Exmingua proceeded on the assumption that consultations "would never be required" and without a social license is nonsensical, as Exmingua engaged in government-sanctioned consultations the results of which were approved, and also continued to support the surrounding communities with an array of social services.[1889] On this record, there is absolutely no basis to find any contributory fault by Claimants.

647. This critical fact renders each of the cases relied on by Respondent distinguishable, as the tribunal in each case found willful or negligent conduct by the claimant that had contributed to its damages—a fact wholly absent here. Guatemala, for instance, erroneously likens the investor's negligence in failing to obtain a legally-required authorization in *Occidental v. Ecuador*[1890] to Exmingua's situation. As shown, however, Exmingua did not fail to obtain any legally-required authorization; to the contrary, it obtained a valid exploitation license after engaging a MARN-registered consultant for the purpose of preparing its EIA, which was duly approved. Similarly, Respondent's reliance upon *MTD v. Chile* – where the claimants were faulted for engaging with an unreliable business partner and failing to obtain adequate professional advice prior to making their investment,[1891] is inapt, as Claimants are highly professionally qualified with expertise in the mining sector[1892] and Exmingua engaged a MARN-approved consultant to carry out consultations for the purposes of its EIA, which the Government then approved.[1893]

648. Finally, the *Bear Creek v. Peru* award supports Claimants, and not Respondent. In that case, the tribunal rejected Peru's argument, like Guatemala's here, that the investor had contributed to the "social unrest" around its mining project, thus warranting a reduction in its damages.[1894] Of particular relevance, the *Bear Creek* tribunal held:

> While…further actions by Claimant would have been feasible, on the basis of the continued coordination with and support by Respondent's authorities, the Tribunal concludes that Claimant *could take it for granted to have complied with all legal requirements with regard to its outreach to the local communities*. Respondent, after its *continuous approval and support* of Claimant's conduct, *cannot in hindsight claim*

[1889] *See supra* § II.B.2 & II.C.3.

[1890] *Occidental Petroleum Corp. and Occidental Exploration and Prod. Co. v. Republic of Ecuador,* ICSID Case No. ARB/06/11, Award dated 5 Oct. 2012 (CL-0314).

[1891] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004 ¶¶ 168-178 (CL-0208).

[1892] *See* Kappes II ¶¶ 5-13; Kappes I ¶¶ 3-4, 8, 10; Clms' Mem. ¶¶ 16-18.

[1893] Clms' Mem. ¶¶ 29, 37, 74.

[1894] *Bear Creek v. Peru*, ICSID Case No. ARB/14/21, Award dated 30 Nov. 2017 ¶¶ 568-569 (CL-0139).

that this conduct was contrary to the ILO Convention 169 or was insufficient, and caused or contributed to the social unrest in the region.[1895]

649. The same is true here.

D. Claimants' Valuation Methodology Fully Repairs the Damage to Claimants

650. In their Memorial, Claimants explained that, at the time of Guatemala's breaches, the Tambor Project had components of both a production and exploration property.[1896] They also explained that, but-for the measures, Exmingua would have continued operating the mine, expanded mining to other deposits, continued exploration to determine how and when to mine the various deposits, and would have had the opportunity to define and develop further mineral resources.[1897] Claimants accordingly valued Exmingua by valuing the Operating Mine, Tambor's Known Exploration Potential, and its Lost Exploration Opportunity.[1898] In doing so, Claimants implemented the following framework:

- Operating Mine: Claimants used an Income Approach, relying on a life of mine ("LoM") plan prepared by SRK that was based on information provided by Claimants and actual production and financial information, to arrive at a value of US$ 70.6 million.[1899] Relying on data from comparable companies with operating mines, Versant confirmed the reasonableness of its valuation.[1900]

- Known Exploration Potential: Claimants calculated their losses related to the additional known gold targets within the two license areas at US$ 89 million.[1901] This valuation conclusion was arrived at by taking the overlapping range of the valuations resulting from SRK's estimation of the potential value of these targets, should they be developed into mines, and the likelihood of achieving this using the Exploration Status Approach and the Geological Probabilistic Approach,[1902] and Versant's Market Approach deriving an EV/Resource multiple that was then applied to SRK's estimate of the resource potential for the Known Exploration Potential.[1903]

- Lost Exploration Opportunity: Claimants calculated their losses between US$ 244 to US$ 291 million for the lost opportunity of exploring additional targets at Tambor and delineating their Mineral Resources.[1904] This valuation was arrived at using a methodology similar to that used to calculate the Known Exploration Potential, *i.e.*,

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[1895] *Id.* ¶ 412 (emphasis added).

[1896] Clms' Mem. ¶ 367.

[1897] *Id*. ¶ 364.

[1898] *Id*. ¶¶ 367-371.

[1899] *Id*. ¶¶ 372-378.

[1900] *Id*. ¶ 376; Versant I ¶¶ 142-144 and Table 12.

[1901] Clms' Mem. ¶ 379.

[1902] Clms' Mem. ¶¶ 382-385; SRK I ¶¶ 67, 87-90, 95-104, 108-109, 114, 116.

[1903] Clms' Mem. ¶¶ 386-391; Versant I ¶¶ 269-270, 170-215, 217-253, 255-269, Tables 18 and 19.

[1904] Clms' Mem. ¶ 393.

> using SRK's probability-adjusted estimation of the quantity of gold that could have been discovered by Claimants between 2016 and 2020,[1905] applying a Geological Probabilistic Approach to the range of amounts derived therefrom,[1906] and then using Versant's Market Approach to value the resource potential.[1907]

651. In its Counter-Memorial, Guatemala rejects Claimants' approach and derives an absurdly low valuation for the Tambor Project. Respondent's quantum expert, Mr. Rosen, rejects the use of the Income Approach to value the Operating Mine[1908] and, instead, values the Operating Mine and the Known Exploration Potential together[1909] using a Market Approach.[1910] While Mr. Rosen does not perform a DCF valuation himself, he presents "for illustrative purposes" an analysis showing the "net present value" based on RPA's restated Versant model in which he changes various assumptions and values the mine using an *ex ante* valuation date as of 5 May 2016, which results in a grossly understated valuation of between "USD 3.3 million and 7.9 million with a median of USD 4.7 million."[1911] Mr. Rosen then presents a "general and illustrative analysis" using a Cost Approach.[1912] Finally, Guatemala and its experts assert that Tambor's Known Exploration Potential and Lost Exploration Opportunity are "purely speculative,"[1913] and dismiss the Lost Exploration Opportunity as "not worthy of serious discussion."[1914] As shown below, Guatemala's valuation methodology grossly undervalues Claimants' losses and does not provide them full reparation.

1. Claimants Appropriately Valued The Operating Mine

652. In their Memorial, Claimants set out that they sustained damages of US$ 70 million related to Exmingua's inability to carry out and complete mining that it began in 2014, in addition to the value of its impounded concentrate, amounting to US$ 645,121 plus interest.[1915] These amounts reflect Exmingua's lost cash flows using an Income Approach, relying upon the LoM Plan over a historical

[1905] *Id*. ¶ 395; SRK I ¶ 120.
[1906] Clms' Mem. ¶ 396; SRK I ¶ 198.
[1907] Clms' Mem. ¶ 398; Versant I ¶¶ 278-279, Table 25.
[1908] Resp's C-M ¶¶ 871-879.
[1909] Secretariat ¶ 150.
[1910] *Id.*¶ 30, § 6.4.
[1911] Resp's C-M ¶¶ 896, 906; Secretariat ¶ 32.
[1912] Resp's C-M ¶ 909.
[1913] Resp's C-M § VII.D.
[1914] Secretariat ¶ 51; RPA ¶ 238.
[1915] Clms' Mem. ¶¶ 372, 378.

period from 3 May 2016 to 31 March 2020 and a future period of 1 April 2020 to 31 December 2026.[1916] Versant has since updated its calculations to a historical period up to 31 March 2021.[1917]

653. In its Counter-Memorial, Guatemala argues that Claimants have inappropriately used a DCF Approach to value the Operating Mine, that the DCF Model inputs are incorrect, and the amount of concentrate valued is unsubstantiated. Guatemala likewise challenges the inputs into SRK's LoM Plan. As shown below, Guatemala's criticisms are unfounded.

a. Claimants' DCF Approach and Model Are Correct

654. Guatemala's contentions that Versant should have relied on a market, rather than an income, approach in valuing the Operating Mine, and its criticisms that Versant failed to deduct taxes from historical losses, include a project-specific risk premium, take into account the effects of the Covid pandemic, and arrived at an overstated value in relation to costs incurred are wrong, as shown below.

655. *First*, Guatemala's assertion that "unresolved uncertainties" render a DCF approach inappropriate[1918] and Mr. Rosen's criticism that Versant should not have used a DCF for a project with Indicated and Inferred Resources, without reflecting for their uncertainty, are groundless.[1919] As Versant confirms, relying on the international valuation guidelines CIMVAL and SAMVAL, the Income Approach is "widely used" where, as here, the property is a production property, with an operational mine, built infrastucture and a fully operational processing plant.[1920]

656. In fact, in the mining context, tribunals have relied on valuations using the DCF approach even for non-operating mines. In *Gold Reserve v. Venezuela*, for example, the tribunal approved the DCF approach for a non-operating mine without any history of cashflows given "the commodity nature of the product [gold] and detailed mining cashflow analysis previously performed."[1921] The tribunal further observed that "many of the arguments in favour of a DCF approach (a commodity product for which data such as reserves and price are easily calculated) mitigates against introducing

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[1916] Versant I ¶ 116.

[1917] Versant II ¶ 25.

[1918] Resp's C-M ¶ 871.

[1919] Resp's C-M ¶¶ 875-879; Secretariat ¶ 257.

[1920] Versant I § III; Versant II ¶¶ 22, 79.

[1921] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/09/1, Award dated 22 Sept. 2014 ¶ 830 (CL-0205).

other methods such as comparable transactions or market capitalization, unless close comparables can be found."[1922]

657. *Second*, Respondent's contention that the "correct valuation method" for the Tambor Project is that "of comparable transactions using a free market approach"[1923] is wrong, as shown above. But even if that were not the case – which it is – Mr. Rosen's Market Approach valuation of the Tambor Project suffers from fundamental flaws. The first is that Mr. Rosen's "comparables" are not at all comparable,[1924] as they are (i) at a pre-operational stage, and (ii) involve projects with significantly lower gold grade, as compared to Tambor.[1925] Secondly, Mr. Rosen's use of an *ex ante* valuation date upon instruction would not restore Claimants to the position that they would have been in but-for Guatemala's egregious breaches as this approach overlooks significant components of damages "including the inability to advance the Tambor Project" between 2016 and now and the increase in gold prices.[1926]

658. *Third*, Respondent's criticism that Versant should have deducted taxes from historical losses[1927] is incorrect. As Versant explained in its First Report and confirms in its Second Report, and as detailed above, Respondent's approach amounts to double taxation.[1928]

659. *Fourth,* Guatemala's argument that Versant should have included a project-specific risk premium in its WACC calculation[1929] is without merit. As Versant explains, such a risk-premium is overly subjective and, thus, inappropriate.[1930] Tellingly, in other cases, Respondent's expert has argued *against* the application of a project-specific risk premium on this very basis.[1931] Mr. Rosen is

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[1922] *Id.* ¶ 831 (CL-0205); *see also Tethyan Copper Co. Ltd. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award dated 12 Jul. 2019 ¶ 313, 330-335 (CL-0316); *see also, e.g.*, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Pvt. Ltd., and Telcom Devas Mauritius Ltd. v. The Republic of India*, PCA Case No. 2013-09, Award on Quantum dated 13 Oct. 2020 ¶ 537 (CL-0367) (same, in telecommunications industry).

[1923] Resp's C-M ¶ 895.

[1924] Versant II ¶¶ 259-262; *see also* Darrell Chodorow & Florin Dorobantu, *Damages in Oil and Gas and Mining Arbitrations in* GAR'S THE GUIDE TO DAMAGES IN INTERNATIONAL ARBITRATION (John A. Trenor ed., 4d ed., 2021) 371 (CL-0286) (explaining that a "multiples analysis" requires a careful assessment of "comparability and the adjustments that attempt to account for differences).

[1925] Versant II ¶¶ 259-262.

[1926] *Id.* ¶ 53.

[1927] Resp's C-M ¶ 874.

[1928] Versant II, ¶¶ 179-193; Versant I ¶ 135; § IV.C.2.

[1929] Resp's C-M ¶ 886; Secretariat, Appendix 7, ¶¶ A.94-A.98.

[1930] Versant II ¶ 218.

[1931] *Pac Rim v. El Salvador*, El Salvador's Rejoinder on the Merits dated 11 July 2014 ¶ 389 (C-1031) ("Navigant suggested a project-risk premium should be considered to account for the greater level of uncertainty associated with using a PFS to predict cash flows. FTI rejects this because, in its view, 'an additional discount would be highly subjective'.") Mr. Rosen was one of the experts from FTI in this case (*Id.*, nn. 551, 545).

not alone in his previously-expressed skepticism: courts have described such a premium as a device that "experts employ to bring their final results into line with their clients' objectives, when other valuation inputs fail to do the trick."[1932] Moreover, Mr. Rosen incorrectly categorizes some risks as project-specific, when they are, in fact, systemic in the mining industry and, thus, already captured in the industry *beta* used by Versant to derive its discount rate.[1933]

660. *Fifth*, Guatemala incorrectly contends that Versant does not incorporate the impact of COVID-19 and, if it had, the valuation would decrease.[1934] In leveling such criticism, Respondent fails to appreciate that the valuation date of 31 March 2020 used in Versant's First Report was merely notional and a stand-in for the date of the Award.[1935] Respondent's comments regarding the immediate short-term fluctuations in gold prices and valuations of gold companies as of 31 March 2020 and the other impacts of COVID-19[1936] are thus irrelevant.[1937] Versant has now updated the valuation date to 31 March 2021,[1938] factoring in the actual development of the COVID-19 pandemic and its impact on the relevant variables.[1939] As Versant explains, indices of gold company values rebounded quickly from an initial dip and have continued their upward trend, suggesting a positive outlook for the industry.[1940]

661. *Finally*, Guatemala's assertion that Claimants' methodology results in a magnitude of damages "unjustifiably greater" than the amounts invested – which, it asserts, can only be explained if "Claimants misled the sellers of those assets" or are trying to "mislead" the Tribunal[1941] – is both wrong and defamatory. Claimants did not purchase Exmingua as a "going concern" and were

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[1932] *Delaware Open MRI Radiology Associates, P.A. v. Kessler*, 24 (CL-0319) ("The calculation of a company-specific risk is highly subjective and often is justified as a way of taking into account competitive and other factors that endanger the subject company's ability to achieve its projected cash flows. In other words, it is often a back-door method of reducing estimated cash flows rather than adjusting them directly. *To judges, the company specific risk premium often seems like the device experts employ to bring their final results into line with their clients' objectives, when other valuation inputs fail to do the trick*.") (emphasis added); *see also*, Kenneth M. Ayotte & Edward R. Morrison, *Valuation Disputes in Corporate Bankruptcy*, VOL.166, UC BERKELEY PUB. LAW RESEARCH PAPER, COLUMBIA LAW & ECON. WORKING PAPER (2018), 4 (CL-0320) ("Attempts at manipulating valuations to serve the self-interest of the litigants is common. In some cases, the manipulation is transparent, and the judge catches it. But in many cases, judges are persuaded to use assumptions that have no reliable basis in finance theory or evidence. The most prominent of these is the use of *"company-specific" or "unsystematic" premiums* when calculating the discount rate for future cash flows. These are nothing more than *arbitrary add-ons that drive the company's reported value downward*.") (emphasis added).

[1933] Versant II ¶ 219.

[1934] Resp's C-M ¶¶ 838-841, 875.

[1935] Clms' Mem. ¶¶ 365, 374, 377; *see also* Versant I ¶¶ 18, 80.

[1936] Resp's C-M ¶ 840.

[1937] Versant II ¶ 220.

[1938] *Id.* ¶ 25.

[1939] *Id.* ¶ 220.

[1940] *Id.* ¶ 220; *id.* n. 396.

[1941] Resp's C-M ¶¶ 871-872.

responsible for bringing the mine into production. In such a situation, any "connection between the invested amount and the value of the investment appears to be much weaker" and, in fact, "[i]t is *not abnormal* for a business's FMV to exceed the invested amount *several times over*."[1942]

662. Indeed, the cost approach for calculating damages for mining projects is considered particularly inappropriate because the "historical cost incurred may bear little resemblance to the current value for natural resources projects"[1943]; the costs incurred thus has limited "economic relevance … when damages are based on the FMV standard because the FMV of extractive projects is insufficiently correlated with spending on exploration and development."[1944] Respondent also ignores that costs expended are not indicative of value, and that an *ex ante* valuation as of 2016 based on costs incurred years earlier does not reflect the value of advancement of the Project.[1945]

b. Claimants' LoM Plan Is Reliable

663. To value the Operating Mine using the DCF method, Versant used inputs from SRK's LoM Plan derived from historical operating and financial data and information from Claimants as to how the mine would have developed but-for Guatemala's breaches.[1946] In its Counter-Memorial, Guatemala raises various challenges to SRK's LoM Plan and offers its own revised LoM Plan ("RPA LoM Plan"), which drastically reduces the mine's revenue stream.[1947] As shown below, Guatemala's criticisms and adjustments to the LoM Plan are unwarranted.

664. *First*, to produce the LoM Plan, SRK properly relied on actual production and financial information from the mine, Claimants' view on how the operation would have continued, and its own professional experience and judgment.[1948] Guatemala's assertions that the LoM Plan is invalid

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[1942] SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 230-231 (2008) (CL-0234) (emphasis added) (further explaining that "[b]y the very nature of the entrepreneurial activity, the sum total of investments is normally lower than the value of a business created as a result. To create a business, in addition to money, an investor usually contributes other ingredients such as management skills, know-how and technology, which add value of the investment and are of particular importance in areas such as energy, infrastructure or construction, frequently featuring in investor-State arbitrations.").

[1943] Darrell Chodorow & Florin Dorobantu, *Damages in Oil and Gas and Mining Arbitrations in* GAR'S THE GUIDE TO DAMAGES IN INTERNATIONAL ARBITRATION (John A. Trenor ed., 4d ed., 2021) 384 (CL-0286).

[1944] *Id.* 393.

[1945] Versant II ¶ 47, §III.D. For these same reasons, Mr. Rosen's reliance on the cost approach as an alleged "reasonableness check" is also inappropriate.

[1946] Clms' Mem. ¶ 368.

[1947] Resp's C-M ¶ 801; RPA Table 9.

[1948] Clms' Mem. ¶ 374; Versant I ¶¶ 76-77.

because there was no contemporaneous LoM Plan[1949] and that the data relied upon cannot be verified, are wrong.

665. As an initial matter, pre-operational (such as feasibility) studies often are required to obtain financing for exploration projects and are aimed at attracting potential investors.[1950] Here, Claimants self-funded the Project and therefore did not need such studies.[1951] Indeed, Mr. Rosen has testified in other cases that, "unless required by regulation . . . feasibility studies are not pursued by private companies as the cost can be prohibitive, while the value provided by such studies is not apparent."[1952] Not only was there no requirement for Claimants to produce pre-operational studies, but any such studies necessarily would provide a less reliable indicator of future performance than the actual operating data.[1953] In criticizing the LoM Plan in this respect, RPA inappropriately treats the Operating Mine as an *exploration project*.[1954] Indeed, once the mine became operational, many of the risks that would have been addressed by a feasibility study only in the hypothetical, would have been overcome.[1955]

666. Respondent's questions about the reliability of the actual plant production data are also misplaced. While the mine was operating, Exmingua gathered and retained reliable data about its performance. As Mr. Kappes explains, daily production logs were compiled and the summary of that data was prepared by Exmingua's plant manager shortly after the May 2016 shutdown.[1956]

667. *Second*, Claimants explained that SRK's assumption of 900,000 tons of ore in the LoM Plan was based on the resource estimate in the Maynard report and is reliable.[1957] RPA's reduction of this resource estimate by *50%*[1958] is entirely unwarranted. Guatemala seeks to justify RPA's reduction by arguing that the Maynard Report is too "old," lacks "confidence classifications," and that SRK did not

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[1949] Resp's C-M ¶¶ 771-777.

[1950] Versant II ¶ 19; SRK II ¶ 20.

[1951] SRK II ¶¶ 20, 23, 35-36, 64; Kappes II ¶¶ 57-60.

[1952] *Bilcon v. Canada*, PCA Case No. 2009-04 Reply Damages Report dated 23 Aug. 2017, at ¶¶ 3.24-3.25 (C-0776).

[1953] SRK II ¶ 23.

[1954] *Id.* ¶ 20.

[1955] *Id.* ¶ 23.

[1956] Kappes II ¶ 69; SRK II ¶ 24; Daily Plant Summary Data for October 2014 – May 2016 (C-0125); Email from D. Kappes to R. Adams (Exmingua) dated 24 Mar. 2017 (C-0721) (explaining the methodology of preparing the summary and forwarding an email from J. Hernandez (Exmingua) to D. Kappes dated 1 June 2016 (attaching the Daily Plant Summary Data for Oct. 2014 – May 2016)); Exmingua's Operation Reports (C-0720).

[1957] SRK I ¶¶ 37, 43; Kappes I ¶ 117; Stephen R. Maynard, Tambor Joint Venture – Summary of Exploration Potential dated 18 Nov. 2003, at 4, Table 1 (C-0046).

[1958] Resp's C-M ¶ 801; RPA ¶ 178.

explain why it chose one of four estimates in that Report.[1959] Guatemala also objects to the inclusion of resources from Laguna Norte in the LoM Plan on the basis that Exmingua did not have an exploitation permit for Santa Margarita and it "voluntary[sic] suspended its exploration" there.[1960] These criticisms are unfounded.

668. The Maynard Report is reliable, as it was commissioned and used by Gold Fields, a respected, international mining company, for its own decision-making process.[1961] As SRK observes, the passage of time since the Report was made does not render the mineral estimate less valid, as the date of the Report has no bearing on the geology of Tambor.[1962] For this reason, the CIMVAL standards allow the use of historical mineral estimates.[1963]

669. Nor does the lack of classification of the resources in the Maynard Report or the classification of those resources as Indicated and Inferred in the CAM Report warrant a reduction in the resource estimate used for the LoM Plan. Confidence classifications are most relevant to potential external investors, since they indicate how much additional exploration must be undertaken to bring the project to fruition, whereas, here, the operating history of the mine obviated the need for any such classification.[1964] As SRK notes, there are many projects that did not have reports with (high or any) confidence classifications, which resulted in successful operating mines that clearly contain mineral resources.[1965] It therefore was unnecessary – and would have been inappropriate – for SRK to "incorporate" the confidence levels present in the CAM Report into the Maynard Report's preliminary resource estimate,[1966] as Guatemala suggests.[1967] Claimants, moreover, had no need to incur the expense of having the resources re-classified as reserves[1968] and, indeed, any difference in geological certainty between reserves and resources had been addressed through actual advancement of mine – rather than a pre-operational feasibility study, which would have been conceptual.[1969] In this regard, SRK's selection among the estimates in the Maynard Report reflects the best representation of what

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[1959] Resp's C-M ¶¶ 771, 784-789, 876.
[1960] *Id.* ¶¶ 778-781.
[1961] SRK II ¶ 28.
[1962] *Id.* ¶ 28.
[1963] Versant II ¶ 92.
[1964] SRK II ¶ 20.
[1965] SRK II ¶ 37, Appendix 1.
[1966] *Id.* ¶ 35.
[1967] Resp's C-M ¶¶ 787-789.
[1968] Versant II ¶ 82.
[1969] *Id.* ¶ 85.

was actually beng mined during operations[1970] and takes into account the parameters that the mine actually achieved once placed into production.[1971] Its resource estimate, in any event, is conservative, as it is very likely that further resources would be proved had mining been permitted to continue.[1972]

670. Nor does RPA have grounds to exclude the underground ore from Laguna Norte in its resource estimate,[1973] on the basis that Exmingua lacked a Santa Margarita exploitation license. The Laguna Norte deposit is correctly considered as part of the Operating Mine, as it was part of the initial conceived mine and slated to produce ore in the near future.[1974] The lack of a license is a result of the very measures challenged in this Arbitration; Claimants had legitimate confidence that Exmingua would obtain the license, and, far from a "voluntary suspension" of their efforts, Exmingua continuously engaged in this regard with the MARN and the MEM, but their actions and omissions at issue in this Arbitration precluded the issuance of the license.[1975] Guatemala cannot rely on the result of its Treaty violations to diminish damages due to Claimants.

671. *Third*, SRK's assumed processing capacity of 250 tpd[1976] is reasonable, whereas RPA's adjustment to 200 tpd or, in the alternative, to 150 tpd,[1977] is not. SRK's assumption is supported by the actual plant data,[1978] and, as SRK confirms, there were no technical obstacles to the plant's consistently continuing to perform at this level.[1979] Guatemala's argument that Exmingua was not authorized to operate at 250 tpd,[1980] moreover, is wrong, as the EIA refers to a *nominal* throughput of 150 tpd, which is not a limit.[1981] Indeed, as noted, the MARN and the MEM repeatedly acknowledged during their inspections that the plant was processing between 200 tpd to 250 tpd, without raising any concerns.[1982]

[1970] SRK II ¶ 34.

[1971] *Id.* ¶ 29; SRK I ¶¶ 18-19.

[1972] SRK II ¶ 30; SRK I ¶ 37. SRK's resource estimate takes into account the ore that had already been mined; SRK's rates of dilution and mining loss are accepted by RPA. *See* SRK I ¶ 37; SRK II ¶ 30; Versant II ¶¶ 159-160; RPA ¶ 178.

[1973] RPA ¶ 178; SRK II ¶ 33.

[1974] Kappes I ¶¶ 95, 114, 122; *see also* SRK I ¶¶ 36, 162-163.

[1975] Clms' Mem. ¶¶ 33, 116-122; Fuentes I § II.C; Fuentes II § II.C.

[1976] SRK I ¶¶ 34-35.

[1977] Resp's C-M ¶ 801; RPA ¶¶ 60.b, 200, Table 9.

[1978] *See supra* § II.C.4; SRK I ¶¶ 28, 34; SRK II ¶¶ 43-47; Kappes I ¶¶ 109, 112; Kappes II ¶¶ 67-71.

[1979] SRK II ¶¶ 47-48; Kappes II ¶ 68.

[1980] Resp's C-M ¶ 793; Progreso VII EIA dated 31 May 2010, at 92 (C-0082).

[1981] SRK II ¶ 50.

[1982] *See supra* §II.C.4.

672. *Fourth*, SRK's use of an 82% recovery rate, which was less than what had been achieved on occasion by the mine and less than that obtained by other plants processing similar ore,[1983] was conservative. Guatemala's use of a 50% recovery rate in its "restated" model[1984] is entirely unjustified.

673. Guatemala simply ignores the most recent plant performance data from January to May 2016, which shows consistent improved recovery, and, instead, inappropriately relies on average recovery rates during the entirety of the plant's operation, when it was in ramp-up mode.[1985] As SRK explains and Mr. Kappes confirms, had the increasing recovery trend been allowed to continue, the target recovery of 82%, as assumed in the LoM Plan, would have been achieved on an average basis within a further three months.[1986] Indeed, while Guatemala questions whether any modifications were made to the plant to increase its recovery rate during its ramp-up period,[1987] such modifications were made.[1988] Claimants followed the usual steps during production ramp-up to improve performance with the aim of consistently maintaining the desired production goals.[1989] As the data shows, recovery rates of 90% were reached on some days before shut down;[1990] RPA's rate of 50% is inconsistent with the data and wildly understated, as no plant would continuously operate at that rate – without any modifications being introduced.[1991]

674. *Finally*, SRK's estimated operating and capital costs, based on historical data and Claimants' assumptions, are reasonable.[1992] Respondent's assertions that SRK should not have relied on any of Claimants' assumptions,[1993] that there are no contemporaneous cost plans, supplier quotes, or receipts to verify the capital cost estimate,[1994] and that the operating cost estimate is inappropriately based on a "limited snapshot" reflecting 2.5 months of operations[1995] are baseless.

[1983] Clms' Mem. ¶ 375(i); SRK I ¶¶ 40, 46; Versant I ¶ 144, Table 12.

[1984] Resp's C-M ¶ 801; RPA ¶ 185.

[1985] SRK II ¶¶ 57-59.

[1986] *Id.* ¶ 59.

[1987] Resp's C-M ¶ 795.

[1988] *See supra* § II.C.4; Kappes I ¶ 111; Kappes II ¶¶ 62-63; Hancock B, Argus Consulting, El Tambor Trip Report: 17-18 Mar. 2016, Review Process and Chemical Programs dated 31 Mar. 2016 (C-0602); SRK II ¶¶ 44-46.

[1989] SRK II ¶¶ 58-59.

[1990] Kappes I ¶ 111; Kappes II ¶ 63; Lab results dated 6 May 2016 (C-0131); Daily Plant Summary Data for Oct. 2014 – May 2016 (C-0125).

[1991] SRK II ¶ 62.

[1992] SRK I ¶¶ 49-58 (citing sources).

[1993] Resp's C-M ¶¶ 797-798.

[1994] *Id.* ¶ 799.

[1995] *Id.* ¶ 800.

675. SRK confirms that Claimants' capital costs estimates are reasonable, in its experience.[1996] Claimants had no need to produce formal and detailed estimates of such costs of the nature required for seeking project finance, and Claimants should not be penalized for not having documentation that they did not need.[1997] SRK's reliance on actual operating costs from the time when the plant was operating at a consistent rate and processing ore from both Guapinol South and Poyza del Coyote[1998] also is reasonable, and, indeed, Guatemala's criticism of SRK's operating costs estimate[1999] *is not supported by its own expert*, which uses the same unit operating costs in its LoM Plan.[2000] RPA's application of a 40% capital cost contingency to in its adjusted LoM Plan[2001] on the basis that Claimants' capital cost estimate is "rudimentary"[2002] is thus entirely unwarranted.[2003]

c. Claimants Appropriately Valued the Impounded Concentrate

676. In their Memorial, Claimants valued Exmingua's impounded concentrate at US$ 645,121, using the current gold price and after accounting for shipping and costs.[2004] In its Counter-Memorial, Guatemala challenges this valuation, faulting Versant for relying on an email between Claimants and Exmingua to determine the amount of the concentrate, failing to deduct royalty payment and taxes, and using the current gold price.[2005] Guatemala's criticisms are groundless.

677. *First*, it is ludicrous for Respondent to complain that the volume of concentrate has been insufficiently verified, *when the concentrate was in Respondent's possession for five years*. If there really was any doubt about the amount of seized concentrate, Guatemala surely would have submitted evidence of the amount in its custody. That it did not speaks volumes. In any event, as Versant confirms, the contemporaneous email containing the inventory of seized concentrate is corroborated by Exmingua's financial statements.[2006] There is no basis for Mr. Rosen's downward adjustment.[2007]

[1996] SRK II ¶¶ 63-65.

[1997] Kappes II ¶ 64; SRK II ¶ 64.

[1998] SRK II n. 34; SRK I n. 48; Kappes I ¶ 121; Tambor Cash Flow data (C-0136); Exmingua Weekly Cash Flow Position for the period between 2 Oct. 2015 and 4 Dec. 2015 (C-0158).

[1999] Resp's C-M ¶¶ 797-800.

[2000] SRK II ¶ 26 (a)–(g). The unit operating cost assumptions used by SRK and RPA are the same, with the overall costs figures between the experts differing due to the stripping ratio and overall LoM duration. SRK II ¶ 39.

[2001] *See* RPA-003.

[2002] Resp's C-M ¶ 801, RPA ¶ 191, Table 9.

[2003] SRK II ¶¶ 64-65. .

[2004] Clms' Mem. ¶ 378; Versant I ¶ 166. .

[2005] Resp's C-M ¶ 880; Secretariat ¶¶ 277-288. .

[2006] Versant II ¶ 248; 2016 Exmingua Financial Statement (C-0766). .

[2007] Secretariat ¶¶ 282-283. .

678. *Second*, as Versant explains, any royalty and tax payments will be made by Claimants on an Award of damages; accordingly, Claimants' damages in relation to the loss in value of the concentrate must be calculated on pre-tax basis, or they would be subject to double taxation.[2008]

679. *Finally*, Versant properly used current gold prices, which comports with its valuation date and which, as explained, is necessary to make Claimants whole.[2009] In fact, despite the recent return of the concentrate, Claimants' losses in this regard have not been mitigated, as Exmingua remains unable to export the concentrate without an export certification, would need to confirm whether the purchaser still wants to concentrate or find another buyer, and incur labor costs for adjusting the moisture in the concentrate, which has been in storage for years.[2010]

2. Claimants Appropriately Value Exmingua's Known Exploration Potential

680. In their Memorial, Claimants claim US$ 89 million in damages for the losses related to the Known Exploration Potential of the Tambor Project, encompassing three hard-rock targets and one saprolite target, based on an overlapping range arrived at by using multiple approaches, namely, SRK's use of the Exploration Status and Geological Probabilistic Approaches to estimate the likelihood of these targets becoming mines, and Versant's application of the Market Approach to derive a value based on EV/Resource multiples, a common valuation method in mining and one that Mr. Rosen also employs.[2011]

681. In its Counter-Memorial, Guatemala assumes that, without certainty of success, Claimants must resign themselves to certain failure,[2012] assigning minimal or no value to a large part of the Tambor Project covering Tambor's Known Exploration Potential (and Lost Exploration Opportunity, discussed below).[2013] In particular, it argues that the methods employed by SRK to calculate the Lost Exploration Opportunity are not accepted in the industry or appropriate to value exploration projects,[2014] and asserts that the targets should not be valued becaue they are not classified as Mineral Resources or Reserves;[2015] challenges Versant's application of the Market Approach;[2016] questions

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[2008] Versant II ¶ 251. .
[2009] *Id.* ¶ 250.
[2010] *See* Kappes II ¶¶ 77-78.
[2011] Clms' Mem. ¶¶ 379-392.
[2012] *See* Versant II ¶ 73.
[2013] Resp's C-M ¶¶ 815, 896, 911; *see also, generally,* Resp's C-M § VII.D.
[2014] *Id.* ¶ 810.
[2015] *Id.* ¶ 808 (quoting RPA ¶ 214).

whether any material mined at these targets could be processed, given that Exmingua's existing plant was at capacity;[2017] and contends that the lack of value is corroborated by Radius' and Gold Fields' exit from the Project.[2018] As explained below, Guatemala's arguments are wrong.

682. *First*, Respondent's attacks on Claimants' valuation methodology are unwarranted. As SRK confirms, the international valuation codes are guidelines that leave the final selection of the valuation approach to the valuer.[2019] Morever, these codes were not designed to value lost opportunity, which is the nature of the claim related to both the Known Exploration Potential and Lost Exploration Opportunity, and hence their application would not address the needs of the present case.[2020] Accordingly, SRK relies on the Geological Probabilistic Method, which is suitable for the valuation of early-stage exploration assets due to its integration of geological probabilities towards assigning a value.[2021] SRK also relies on the Exploration Status Method, which is an adaptation of the well-known Multiple of Exploration Expenditure Method.[2022]

683. Respondent's insistence that, because the exploration targets are not categorized as Mineral Resources or Reserves, they cannot be valued in this manner reprises its earlier remarks regarding classification and, in any event, are incorrect. As SRK explains, these targets contain conceptual tonnages and grades, with the expectation that they would have been converted into resources by 2020, which can then be used in conjunction with their geological aspects to arrive at a valuation.[2023] In fact, RPA inappropriately treats the entire Known Exploration Potential and Lost Exploration Opportunity as greenfield (*i.e.*, exploration on new terrain), when it is more appropriately characterized as brownfield (*i.e.*, exploration in and around a mining operation), given that it is adjacent to (and in some cases directly beneath) a producing, operating mine.[2024] As SRK explains, "the mineral occurences and exploration targets within the[] geologically defined mineralised camps hold significantly higher probabilities of successful discovery than the examples discussed in the papers and studies listed by RPA. . . . This fact, and the utilisation of geological theory, understanding

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[2016] Resp's C-M ¶ 875.
[2017] *Id.* ¶ 807.
[2018] *Id.* ¶ 811.
[2019] SRK II ¶¶ 75, 95.
[2020] *Id.* ¶ 92 (c).
[2021] *Id.* ¶¶ 103, 105.
[2022] *Id.* ¶¶ 94, 97.
[2023] SRK II ¶ 78.
[2024] *Id.* ¶¶ 98, 100-101, 118; Kappes II ¶ 58.

and data to guide project valuation is distinctly lacking in RPA's report."[2025] Indeed, as SRK notes, its estimate is conservative: With respect to the hard-rock targets, mineral resources of this type typically increase as mining progresses[2026] and, for the saprolite target, SRK made conservative assumptions regarding the resource depth.[2027]

684. *Second*, Guatemala's criticisms of Versant's Market Approach valuation of the Known Exploration Potential are equally unsound. In particular, Respondent's dismissal of the comparables relied upon by Versant on the basis that these were "significantly more advanced" that Tambor's Exploration Targets[2028] is unwarranted. Guatemala ignores that, had exploration been allowed to continue, these targets would have been more advanced. Guatemala's assumption that projects with defined resources and available economic studies are more advanced than Tambor also is incorrect, as it ignores its own expert's previous acknowledgment in other cases that such studies are unnecessary for self-funded private companies (or for companies not preparing for a sale)[2029] and that mineral resources need not be publicly stated to have value.[2030] Critically, moreover, Guatemala erroneously concludes that Versant's comparables are "more advanced" because it fails to take into account that, but-for Guatemala's Treaty breaches, Exmingua would have advanced the targets.[2031] By using an *ex ante* valuation date as of 2016, Respondent's valuation penalizes Claimants for the non-advancement of the Project that is a direct result of its Treaty breaches and thereby transfers the cost of those breaches from itself onto Claimants.[2032]

685. *Third,* Guatemala's rejection of the Known Exploration Potential on the basis that Exmingua's plant might not have had capacity as of 2016 to process ore from the Known Exploration Potential reflects its ignorance as to "the way in which the exploration and mining industry operates."[2033] Given the opportunity, as and when further resources were proved, Claimants and Exmingua would have either extended the mine life to allow for processing of the additional resources or increased the processing capacity of the plant, for which there was no technical impediment.[2034]

[2025] SRK II ¶ 101.
[2026] SRK II ¶ 85; SRK I ¶¶ 76-77.
[2027] SRK II ¶ 81 and Appendix 4 ¶ 2; SRK I ¶ 82.
[2028] Resp's C-M ¶ 875.
[2029] Versant II ¶¶ 19, 60, 83 (quoting Mr. Rosen's Reply Damages Report dated Nov. 2019, ¶ 3.25 (C-0776)).
[2030] *Id.* ¶ 93.
[2031] *Id.* ¶¶ 99; § V.
[2032] Versant II ¶¶ 17-18, 69.
[2033] SRK II ¶ 90.
[2034] *Id.* ¶ 90.

686. *Finally*, there is no basis to conclude, as Guatemala does, that the Known Exploration Potential lacks value because Radius and Gold Fields exited the Project.[2035] Respondent, in fact, overlooks that Radius maintained a "significant economic exposure" to the Project, as it accepted future royalty payments as partial compensation for its controlling interest in Exmingua and, when Gold Fields sold its interest, it similarly retained an economic interest in Radius (and, by extension, in the Tambor Project).[2036] Furthermore, Gold Fields' assessment of the deposit was based on only three targets, on which it focused its exploration, as opposed to the entirety of the Project area.[2037] As SRK explains, Radius and Gold Fields likely would have explored additional targets (particularly the ones that are the focus of Claimants' Known Exploration Potential and Lost Exploration Opportunity) once the economics of the Tambor Project had been illustrated and the gold hosting potential of the district had been proved (as it was by Exmingua under Claimants' management and control), in a similar way as Claimants planned.[2038] In fact, there are many projects that have developed into successful mines after respected, international mining companies sold their interest before they fully explored the deposits.[2039]

687. Adopting Guatemala's approach would mean there was *no* gold and *no* value in the areas surrounding the Operating Mine, which is belied by the exploration results, not scientifically-based and unfairly penalizes Claimants, by shifting the effects of Guatemala's Treaty breaches onto Claimants.[2040] Respondent, in fact, expressly argues in favor of its under-valuation on the basis that Exmingua did not develop the Tambor Project between 2016 and 2020[2041] – a fact that directly resulted from the very measures that are challenged in this Arbitration.[2042]

3. Claimants Appropriately Value Exmingua's Lost Exploration Opportunity

688. In their Memorial, Claimants valued Exmingua's Lost Exploration Opportunity between US$ 244 and US$ 291 million, representing the value of the gold ounces that could have been discovered with another four years of explorationand which are not included in either the Operating Mine or the

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[2035] *See* Resp's C-M ¶ 811; Secretariat ¶ 198.

[2036] *See supra* §II.A.1; Versant II ¶¶ 138, 146; Kappes I ¶ 30.

[2037] *See supra* §II.A.1; SRK I ¶ 133; SRK II ¶ 116, 163; Stephen R. Maynard, Tambor Joint Venture – Summary of Exploration Potential dated 18 Nov. 2003, at 5, Table 2 (C-0046); CAM Report dated 7 Jan. 2004, at 1.2, ¶ 1.4 (C-0039).

[2038] SRK II ¶ 91.

[2039] *Id.* ¶¶ 165-166.

[2040] Versant II ¶¶ 16-18, 68-73.

[2041] Secretariat ¶ 237.

[2042] Versant II ¶¶ 16-17, 68-73.

Known Exploration Potential.[2043] SRK arrived at a probability-adjusted calculation of these gold ounces contained in seven targets by referencing geologically similar deposits in Central America and worldwide to estimate the potential gold ounces.[2044] Versant then applied the EV/Resource multiple that it derived from its Known Exploration Potential analysis to the number of ounces estimated by SRK to calculate a range of values for Tambor's Lost Exploration Opportunity.[2045]

689. In its Counter-Memorial, Guatemala asserts that the Lost Exploration Opportunity "does not merit any serious discussion" and assigns it no value at all.[2046] It questions Claimants' methodology, arguing that it is "not based on any verifiable, industry-recognized understanding of the concession area" and is more "akin to the one used by governments and international agencies to 'assess the so-called undiscovered mineral endowment.'"[2047] Guatemala further criticizes SRK for defining each target in terms of ounces rather than using a "conceptual" NPV,[2048] and Versant for purportedly treating the entire exploration potential as a "confirmed Mineral Resource."[2049] Guatemala's criticisms are misplaced.

690. *First*, contrary to Mr. Rosen's suggestion, there is no basis to conclude that the Lost Exploration Opportunity is not serious or well-considered,[2050] on account of the fact that Versant included a short discussion of the same in its First Report.[2051] In making this comment, Mr. Rosen curiously avoids acknowledging that SRK devoted significant space in its First Report to the Lost Exploration Opportunity; it, in fact, devoted more than 25 pages to the same.[2052] Mr. Rosen likewise ignores that Versant implements the same methodology to calculate both the Known Exploration Potential and the Lost Exploration Opportunity, so it would have been highly inefficient for Versant to reproduce, in full, its previous discussion for superficial purposes, when it could more appropriately merely summarize and refer the Tribunal back to its earlier analysis. Respondent's attempt to simply dismiss Tambor's Lost Exploration Opportunity on this basis cannot succeed.

[2043] Clms' Mem. ¶ 393-395; SRK I ¶¶ 119, 174-175, 206; Versant ¶¶ 272, 279.
[2044] SRK I ¶¶ 117-207; Clms' Mem. ¶¶ 394-397.
[2045] Versant I ¶¶ 272-279; Clms' Mem. ¶ 398.
[2046] Resp's C-M ¶¶ 814-815 (quoting RPA ¶ 243); Secretariat ¶ 51.
[2047] Resp's C-M. ¶¶ 812-813; *see also id.* ¶¶ 803, 814-815.
[2048] Resp's C-M ¶ 814.
[2049] Resp's C-M ¶ 814; *see also id.* ¶ 875.
[2050] Secretariat ¶¶ 50-51.
[2051] Versant I § VII.
[2052] *See* SRK I ¶¶ 117-206.

691. *Second*, Guatemala's experts, *none of whom are geologists*, have failed to properly engage with SRK's detailed considerations of Tambor's geology necessary to appreciate the value of the Lost Exploration Opportunity.[2053] Respondent's lack of required expertise renders its dismissal of Claimants' claim and its assigning it *zero* value entirely unpersuasive. Indeed, while RPA criticizes SRK's methodology, it does not offer *any* alternative approach. Moreover, RPA misunderstands that, in addition to a qualitative assessment used by governments to assess mineral endowment, SRK applies the Geological Probabilistic Approach to the identified gold,[2054] and thus has engaged in a sophisticated, two-stage methodologythat Respondent fails to undermine.

692. *Third*, Respondent's remark that the Lost Exploration Opportunity defined by SRK does not constitute a Mineral Resource or Mineral Reserve misses the point; SRK aimed to define the Lost Exploration Opportunity that could have been realized with further exploration between 2016 and 2020 (or 2021) .[2055] As explained above, given time and but-for Guatemala's measures, these targets could have been defined with greater certainty and had the opportunity to become Mineral Resources.[2056] In any case, that does not preclude their valuation and SRK has adjusted the targets' value for the probability of advancing to become a Mineral Resource.[2057] Further, the calculation performed by SRK using potential ounces of gold (rather than a conceptual NPV) is appropriate, because the aim was not to estimate the potential value or cost of the discovery (for which NPV would have been appropriate), but rather to define the potential gold that could have been discovered.[2058]

693. *Finally,* as with Respondent's misplaced criticism of Claimants' Known Exploration Potential valuation, its critique of Versant's approach to the Lost Exploration Opportunity stems again from its reliance on an *ex ante* valuation date and its refusal to acknowledge that, but-for its Treaty breaches, Claimants would have advanced the Tambor Project.[2059] In sum, as Versant remarks, "it would be unacceptable to a willing seller to accept, with certainty, that there would be *no* value across seven exploration targets that have been tested and are in proximity to an operating mine."[2060]

[2053] SRK II ¶ 132; *see also id.* ¶ 109.
[2054] SRK II ¶ 152.
[2055] *Id* ¶ 137.
[2056] *See supra* § IV.D.2.
[2057] SRK II ¶¶ 138, 159.
[2058] SRK II ¶ 161(a).
[2059] Versant II ¶¶ 331-333.
[2060] *Id.* ¶ 333 (emphasis added).

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694. For all of the reasons set out above, Claimants' valuation methodology is robust, whereas Respondent's challenges to the same do not withstand scrutiny. Claimants have now updated their analysis to a current valuation date of 31 March 2021, and calculate their damages at US$ 419 – 449 million, composed of: (i) US$ 82 million relating to the Operating Mine, (ii) US$ 85 million relating to Exmingua's Known Exploration Potential and (iii) US$ 252 – 332 million in relation to Exmingua's Lost Exploration Opportunity.[2061]

E. Claimants Are Entitled To Compound Interest At A Commercial Rate

1. The Tribunal Should Award Interest At A Rate Of US Prime + 2%

695. As set forth in the Memorial, the award of interest is a necessary component to ensure full reparation for Claimants, and must run until the date of payment of the Award.[2062] As further set forth in the Memorial, Claimants seek (i) interest on Lost Cash Flow from the Operating Mine at U.S. Prime plus 2%, compounded annually[2063] and (ii) post-award interest at U.S. Prime plus 2%, compounded annually, from the date of Award until the date of payment.[2064] In its Counter-Memorial, Respondent argues for the application of a risk-free rate, such as the rate of US government treasury bonds,[2065] on the basis that "Claimants did not assume the risk associated with the investment from the time they stopped exploring and exploiting the operations in Progreso VII and Santa Margarita" and that NAFTA tribunals have awarded interest at risk-free rates.[2066] Respondent's arguments cannot be sustained.

696. The only guidance provided under the DR-CAFTA regarding the appropriate rate of interest is found in Articles 10.26.1 (allowing for the award of "any applicable interest")[2067] and 10.7.3 and 10.7.4 (providing that a lawful expropriation must be accompanied by compensation including "interest at a commercially reasonable rate … accrued from the date of expropriation until the date of payment").[2068] This latter requirement would make no sense if, as Guatemala suggests, a State that violates its Treaty obligations was permitted to pay interest on an award of damages at a rate less than

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[2061] *Id.* ¶ 344.
[2062] Clms' Mem. ¶¶ 356-359.
[2063] *Id.* ¶¶ 377, 399, 401 (ii).
[2064] *Id.* ¶¶ 399-401.
[2065] Resp's C-M ¶ 912.
[2066] *Id.* ¶¶ 915-919.
[2067] DR-CAFTA, Art. 10.26.1 (CL-0001).
[2068] *Id*., Arts. 10.7.3 and 10.7.4.

that which is "commercially reasonable." Thus, there can be no doubt that a commercially reasonable rate is required.

697. A "normal commercial rate" has been held by tribunals to mean "the rate at which the Claimants could themselves have borrowed the same sum."[2069] In this context, reference to the U.S. Prime rate, *i.e.*, "a borrowing rate that is only available to the most creditworthy borrowers, typically large corporate customers," along with a premium to "reflect a commercial rate that is widely available to market participants,"[2070] is considered to be an appropriate measure of the applicable interest rate.[2071] DR-CAFTA tribunals thus have awarded "US Prime rate of interest plus a 2 percent premium" for treaty breaches, considering it to be a "commercial rate."[2072] Similarly, other tribunals have awarded the equivalent rate of "LIBOR + 4%".[2073]

[2069] *Tidewater Investment SRL and Tidewater Caribe, C.A. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award dated 13 Mar. 2015 ¶ 209 (CL-0321).

[2070] Versant I ¶ 282.

[2071] *See also* Thierry Sénéchal, *Present Day Valuation in International Arbitration: A Five Principle-Based Framework for Awarding Interest, in* INTEREST, AUXILIARY AND ALTERNATIVE REMEDIES IN INTERNATIONAL ARBITRATION223, 215-232 (Filip J.M. De Ly and Laurent Lévy eds., 2008) (CL-0322) ("For a transnational commercial dispute, we advocate the use of a risk-free rate (e.g. government bonds) plus a market-risk premium (as measured from [a] historical average of the excess of the market return over the risk-free rate). The rationale for using such an approach is based on the assumption that businesses will generally tend to demand an extra payoff above the risk-free rate for investing in [] assets with some level of risk. The *raison d'être* of businesses is to seek higher returns based on their risk profile. Incorporated investors and businesses will not usually invest at the risk-free rate. In international arbitration, arbitrators and parties should recognize that the claimant will seek to maximize profits and earn incremental returns on their investments that are proportional to the amount of additional risk those investments add to their portfolio."); IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW 6.90 (2nd ed., 2017) (CL-0313) ("The 'prime' or 'base' rate plays an important role in negotiations about company loan conditions in Anglo-American countries. As such, it seems to be an appropriate basis for the assessment of the damages incurred by delayed payment. However, it must be taken into account that not all enterprises can borrow money from the banks at the prime rate so that an increase by a few percentage points might be necessary.").

[2072] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award dated 19 Dec. 2013 ¶ 767 (CL-0031-ENG/SPA); *see also TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Resubmission Proceeding, Award dated 13 May 2020 ¶ 135 (CL-0323) ("[T]he Tribunal again considers that the appropriate rate is one that the Claimant would have been expected to pay to repair the injury. Here, the majority of the Tribunal agrees with the Original Tribunal that the US Prime rate of interest plus 2%, payable both pre- and post-Award until the date of payment, is an appropriate rate."); *id.* ¶¶ 133 – 134 ("The majority of the Tribunal considers that the focus in the award of damages is upon the reparation of injuries sustained, and that it is accordingly the rate that a claimant would have had to pay to repair the injury that is the point of reference in determining the interest rate. While it is true that Claimant's investment in EEGSA was no longer at risk after it had sold that investment for cash, if Claimant had borrowed in order to fill the gap in the sums owing to it as a consequence of Respondent's breach, it would have had to borrow at commercial rates.").

[2073] *See, e.g.*, *Mobil Investments Canada Inc. and Murphy Oil Corp. v. Canada*, ICSID Case No. ARB(AF)/07/4, Award dated 20 Feb. 2015 ¶ 170 (CL-0324); *Murphy Exploration & Prod. Co. – Int'l v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award dated 6 May 2016 ¶¶ 518-523 (CL-0203-ENG); *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Award dated 2 Dec. 2016 ¶ 772 (CL-0325); *City-State N.V. and others v. Ukraine,* ICSID Case No. ARB/14/9, Award (Dispositif) dated 26 July 2018 ¶ 694 (CL-0326); *Olympic Entertainment Group AS v. Ukraine*, PCA Case No. 2019-18, Award dated 15 Apr. 2021 ¶ 185 (CL-0327); *see also* Versant II fn. 429.

698. As a preliminary matter, Guatemala's expert misapplies the U.S. Government five-year Treasury Bond yield rates on a simple interest basis, thus effectively providing less than risk-free rate.[2074] Further, the "risk-free rate" sought to be applied by Respondent is not a "commercially reasonable rate" because it is not available to participants in the commercial sector. Thus, in *Bear Creek v. Peru*, where the Canada-Peru FTA required that interest be based on a "commercially reasonable rate,"[2075] the tribunal rejected the application of a risk-free rate of 0.16%, "because Respondent could not borrow and Claimant would not lend at that rate."[2076] Similarly here, the risk-free rate of 1.20% should not apply, as neither Claimants nor Respondent can borrow at this rate.[2077]

699. A risk-free rate would not properly compensate Claimants for the opportunity cost and time value of their lost investment.[2078] The application of a risk-free rate of interest in the context of a mining project thus was properly rejected by the tribunal in *Tethyan Copper v. Pakistan*, "[g]iven the undisputed opportunities to achieve high returns in the mining business and the undisputed risks associated with these opportunities …."[2079] Instead, the tribunal considered the claimant's and its owners' "borrowing costs, *i.e.*, the cost for having to borrow the money that should have been, but was not, made available to [the claimant]" to be a more appropriate measure of interest,[2080] and awarded interest at the US Prime Rate plus a premium.[2081] Indeed, "too low a pre-award interest rate – as it happens when applying a risk-free interest rate – will give respondents a perverse incentive to refuse the voluntary payment of compensation right after the damage and to delay the arbitration procedure, as the low pre-award interest rate will allow the expropriating State to implicitly fund its future liability on US Treasury terms."[2082]

[2074] Versant II ¶ 348.

[2075] *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award dated 30 Nov. 2017 ¶ 712 (CL-0139-ENG) (emphasis omitted).

[2076] *Id.* ¶ 714.

[2077] Versant II ¶ 351.

[2078] *See, e.g.*, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award dated 8 Nov. 2010 ¶ 514 (CL-0219) ("The Tribunal concludes that a more appropriate rate is the risk-free rate plus the market risk premium, which … is 9.11% in total. The Tribunal believes that this rate better reflects the opportunity cost associated with Claimant's losses, adjusted for the risks of investing in Ukraine.").

[2079] *Tethyan Copper Co. Ltd. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award dated 12 July 2019 ¶ 1792 (CL-0316).

[2080] *Id*.

[2081] *Id.* ¶¶ 1799-1800.

[2082] Manuel Conthe*, The Award and the Courts, Time-travel Riddles in the Assessment of Damages, in*, AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 286 (Christian Klausegger, Peter Klein, *et. al.* eds., 2020) (CL-0328); *see also* M.A. Abdala, P.D. Lopez Zadicoff and P.T. Spiller, *Invalid Round Trips in Setting Pre-Judgment Interest in International Arbitration*, *in* 5 WORLD ARBITRATION AND MEDIATION REVIEW No. 1 (2011) 17-18 [14-15] (CL-0329) ("[I]f the [pre-judgement interest] rate is lower than respondent's cost of raising funds (and ignoring any reputation considerations that may affect future endeavors), it becomes cheaper for a potential offender to raise funds by breaching investment contracts than by

700. In light of the above, the Tribunal should award Claimants pre- and post-award interest at a rate of US Prime + 2%.

2. Interest Should Be Compounded Annually

701. In their Memorial, Claimants demonstrated that current international law practice overwhelmingly favors the compounding of interest, rather than the award of simple interest.[2083] As Claimants explained, over the last two decades, the award of compound interest has been recognized as a form of *jurisprudence constante*, and has now become the norm.[2084]

702. A 2016 empirical study of investment awards (carried out by PwC) showed that compound interest was awarded in an overwhelming majority (85% or 86%) of international arbitration awards rendered between 2006 and 2015.[2085] A recently updated survey of ICSID awards aligns with this conclusion, with the author noting that "[c]ompound interest has been used ever more frequently over

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sourcing in the open market. Furthermore, a [pre-judgement interest] lower than respondent's cost of raising funds provides it with incentives to delay the arbitration process, so as to continue benefitting from the lower 'financing' rate. Therefore, to guarantee the efficiency of the conflict resolution system, the [pre-judgement interest] has to be no lower than the respondent's cost of raising funds.").

[2083] Clms' Mem. ¶¶ 360-361.

[2084] *Id.* ¶¶ 359-361 (citing cases); *see also Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award dated 17 Feb. 2000 ¶ 104 (CL-0134); SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 385 (2008) (CL-0234) (referring to the *Santa Elena* award, issued in 2000, as "a turning point in jurisprudence"); IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW 6.239 (2nd ed., 2017) (CL-0247) ("A real change of trend towards accepting compound interest became obvious in the year 2000. In February [of that year], the tribunal in *Compañía del Desarrollo de Santa Elena v Costa Rica* dealt with this issue in remarkable detail"); *Gemplus S.A. and Talsud S.A. v. The United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 and ARB (AF)/04/4, Award dated 16 June 2010 ¶ 16-26 (CL-0155) ("[I]t is the universal practice of banks and other loan providers in the world market to provide monies at a cost amounting to or equivalent to compound rates of interest and not simple interest. . . . [T]he current practice of international tribunals (including ICSID) is to award compound and not simple interest."); *Chevron Corp. (USA) and Texaco Petroleum Co. (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award dated 30 Mar. 2010 ¶ 555 (CL-0175) (compound interest has become "the prevailing practice of international tribunals"); *Murphy Exploration & Prod. Co. – Int'l v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award dated 6 May 2016 ¶ 519 (CL-0203) (noting that the arbitral practice during the past fifteen years suggests that compound interest is "commonly applied"); *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and Principles of Quantum dated 30 Dec. 2016 ¶ 895 (CL-0330) ("[T]he majority of investment tribunals have in recent years decided to award compound interest and even most of those tribunals that decided to award simple interest for a particular reason, recognized that compound interest represents what the *CME* tribunal described as the 'prevalent contemporary commercial reality'"); *Stans Energy Corp. and Kutisay Mining LLC v. The Kyrgyz Republic*, Award dated 20 Aug. 2019, ¶ 851 (C-0331) ("[T]he Tribunal agrees that, in accordance with the standard practice in recent investment arbitration, pre-award interest…should be compounded annually…and post-award interest on the full amount awarded should be compounded annually from the date of the present Award until the date of payment.").

[2085] PwC, *2015 – International Arbitration Damages Research: Closing the gap between Claimants and Respondents* 3(1) J. OF DAMAGES IN INT'L ARB. (June 2016) 108, 99-109 (CL-0332); *see also* PwC, *International Arbitration Damages Research: 2017 Update* 7 (Dec. 2017) (CL-0385) ("Of 21 new cases, compound interest was awarded in respect of 19 of them."); PwC, *Damages awards in international commercial arbitration: A study of ICC awards*, 20 (Dec. 2020) (CL-0333) ("[I]n investment treaty cases, [Tribunals] tend to assume that compound interest is the generally accepted approach").

time."[2086] As a matter of practice, "many arbitrators have applied the same rate to both pre- and post-award phases, suggesting that for those tribunals the basis and rationale for interest pre- and post-award are the same (or that any potential differences are immaterial)."[2087]

703. In its Counter-Memorial, Respondent tries to turn this well-established position on its head, arguing that "the practice of investment arbitration supports the award of simple interests [sic], with only *exceptional circumstances* for the opposite case" by relying upon either older or clearly distinguishable authorities.[2088] As shown, "compound interest as opposed to simple interest appears to be *predominantly accepted as appropriate in recent international investment arbitration*. It is regarded as better reflecting actual economic realities both for the purpose of remedying the loss actually incurred by the injured party and for the prevention of unjustified enrichment of the respondent State," and the award of simple interest consequently has now become the "exception," which is wholly unwarranted in this case.[2089] Unsurprisingly, Guatemala fails to acknowledge this fact or that compound interest has been awarded in cases arising under the DR-CAFTA, including cases against Guatemala,[2090] and in cases where the applicable treaty, like the DR-CAFTA called for interest at a commercial rate.[2091]

704. It is difficult to see how *Wena Hotels v. Egypt*, relied upon by Respondent, supports its argument, as that tribunal articulated that "an award of compound (as opposed to simple) interest is *generally appropriate in most modern, commercial arbitrations*."[2092] Similarly, in *Tza Yap Shum v Peru*, the tribunal ordered that interest was to be "capitalized semi-annually"[2093] – which means that

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[2086] James Dow, *Pre-Award Interest, in* GAR'S THE GUIDE TO DAMAGES IN INTERNATIONAL ARBITRATION (John A. Trenor ed., 4d ed., 2021) 11(CL-0334).

[2087] BORZU SABAHI, NOAH RUBINS, ET AL., INVESTOR-STATE ARBITRATION 21.97 (2d ed., 2019) (CL-0299); *see also* PwC, *2015 – International Arbitration Damages Research: Closing the gap between Claimants and Respondents* 3(1) J. OF DAMAGES IN INT'L ARB. (June 2016) 108, 99-109 (CL-0332).

[2088] Resp's C-M ¶¶ 924-926 (emphasis added).

[2089] IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW 6.248 (2nd ed., 2017) (CL-0372).

[2090] *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award dated 29 June 2012, ¶¶ 280-281 (CL-0068); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award dated 19 Dec. 2013 ¶ 768 (CL-0031).

[2091] *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award dated 13 Mar. 2015 ¶ 209 (CL-0321) ("Article 5 of the BIT, [ ] requires a 'normal commercial rate.' This is the rate at which the Claimants could themselves have borrowed the same sum. Since a commercial bank will typically compound interest due and unpaid on a quarterly basis, the Tribunal considers that its award of interest ought to be so compounded."); *see also* PwC, *Damages awards in international commercial arbitration: A study of ICC awards*, 20 (Dec. 2020) (CL-0333) ("[M]ost investment treaties include a clause that allows for a commercial rate of interest, and Tribunals appear to have converged on a consensus that commercial rates are calculated on a compound basis").

[2092] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award dated 8 Dec. 2000 ¶ 129 (CL-0151) (emphasis added).

[2093] *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award dated 7 July 2011, *Decisión, point 3* (CL-0143).

compound interest (and not simple interest) was awarded. *Autopista Concesionada v. Venezuela,*[2094] *Astaldi S.p.A. v. Republic de Honduras*,[2095] and *Elsamex v. Republic of Honduras*,[2096] moreover, are distinguishable, as they arose in the context of contractual, as opposed to treaty, breaches.[2097] And, in *Société Générale v. Paraguay*, the claimant specifically "requested simple interest" on the basis that it was the rate "[claimant] typically charge[d] on unpaid invoices."[2098] Finally, *CME v. Czech Republic* is an outlier, and justified on the facts by the tribunal on the basis that the generous interest rate (of 10%) awarded to claimant would already fully repair any damages incurred by the delay[2099] and, thus, does not establish any general principle in favor of simple interest.

705. Respondent's last-ditch argument that the application of compound interest "is prohibited [by Guatemalan law] in civil obligations and must be agreed upon in commercial obligations in order to be effective"[2100] is also flawed. National rules on interest do not apply in investment treaty cases.[2101] Indeed, Guatemala fails to even acknowledge that compound interest has been previously awarded by DR-CAFTA tribunals in prior cases against Guatemala.[2102]

[2094] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/00/5, Award dated 23 Sept. 2003 (RL-0261).

[2095] *Astaldi S.p.A. v. Republic de Honduras*, ICSID Case No. ARB/07/32, Award dated 17 Sept. 2010 (RL-0293) .

[2096] *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Award dated 16 Nov. 2012 (RL-0262) .

[2097] *See* IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW 6.249 (2nd ed. 2017) (CL-0313) ("The tribunal in *Autopista Concesionada v Venezuela*, for example, examined whether compound interest should be awarded on the basis of an agreement by the parties, of national law, or of international law. It emphasized that the case had to deal with a breach of contract and not with an expropriation. Consequently, the decisions in *Wena Hotels v Egypt* and *Compañía del Desarrollo de Santa Elena v Costa Rica* in favour of compound interest were not considered as comparable. Furthermore, the tribunal pointed to the award in [*Santa Elena*] which had expressly emphasized the difference between expropriations and cases 'of simple breach of contract' and had held that 'there is a tendency in international jurisprudence to award only simple interest … in relation to breach of contract.'").

[2098] *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award dated 10 Feb. 2012 ¶ 186 (RL-0263).

[2099] *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award dated 14 Mar. 2003 ¶ 643 (RL-0260).

[2100] Resp's C-M ¶ 927.

[2101] *Tethyan Copper Co. Ltd. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award dated 12 July 2019 ¶ 1802 (CL-0316) ("One of the arguments put forward by Respondent is that under Pakistani law, compound interest is prohibited in the absence of a specific agreement to that effect… The Tribunal is not convinced by this argument, however. It is undisputed between the Parties that the present dispute arises under international law and is to be decided pursuant to the rules of international law, in particular the provisions of the Treaty."); *see also* SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 371 (2008) (CL-0234) ("The host-country-law approach has been criticized on the basis that where the State's international responsibility is engaged, the award of interest should follow the rules of international law"); *Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award dated 15 Apr. 2016 ¶ 447 (CL-0166) ("The Tribunal cannot follow the Respondent when it argues that compound interest is inadmissible as a matter of Venezuelan law. The consequences of internationally wrongful acts are governed by international law."); *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award dated 12 Apr. 2002 ¶ 174 (CL-0137) ("[T]he provision in Egyptian law on which Respondent relies is not applicable to claims based on the BIT, i.e. public international law").

[2102] *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award dated 29 June 2012, ¶¶ 280-281 (CL-0068-ENG); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award dated 19 Dec. 2013 ¶ 768 (CL-0031-ENG/SPA).

706. As shown, the award of compound interest is the prevalent approach in investment arbitration jurisprudence, as it is necessary to ensure full reparation, to which Claimants are entitled.

V. CONCLUSION

707. Claimants hereby request that the Arbitral Tribunal constituted in this case issue a final award:

(a) Dismissing Guatemala's objections to the Tribunal's jurisdiction;

(b) Declaring that Guatemala breached its obligations under the DR-CAFTA;

(c) Ordering Guatemala to compensate Claimants in the amount of:

  (i) Damages of US$ 419 million - US$ 449 million;

  (ii) Pre-award interest at the U.S. Prime Rate plus 2%;

  (iii) Costs associated with these proceedings, including arbitration costs, professional fees, attorneys' fees, and disbursements; and

  (iv) Post-award interest at the U.S. Prime Rate plus 2% on all amounts awarded until the date of payment;

(d) Dismissing Guatemala's counterclaim; and

(e) Granting such further or other relief as the Tribunal may deem appropriate.

Respectfully submitted

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11 June 2021